COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 119 of 2021

B E T W E E N

LUCRETIA ROLLE

Appellant

AND

THE AIRPORT AUTHORITY

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Ms. Travette Pyfrom, Counsel for the Appellant**

Mrs. Lakeisha Hanna, Counsel for the Respondent

DATES: **17 May 2022; 25 July 2022**

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Civil appeal – Personal injury – Slip and fall - Statute barred – Limitation period – Res judicata - Estoppel – Issue estoppel – Henderson v Henderson – Knowledge of the proper defendant – Strike Out - Order 18 Rule 19 of the Rules of the Supreme Court – Sections 9 and 10 of the Limitation Act

The appellant was employed by the respondent for a period of seven years. In the course of her employment, on 6 January 2011, she slipped and fell, sustaining injuries. She commenced an action against the respondent by Writ of Summons filed on 6 January 2016 claiming negligence and breach of statutory duty. In its Defence, the respondent denied certain allegations and put the appellant to strict proof. The respondent sought, and was granted, leave to amend its Defence. By its amended Defence the respondent asserted that it was not liable in negligence or breach of statutory or common law duty for the injuries suffered by the appellant.

Thereafter, the respondent filed an application to have the appellant's Statement of Claim struck out as being scandalous, frivolous and vexatious and otherwise an abuse of the process of the court. The respondent, in essence, asserted that the appellant's claim was made against the wrong party. The learned judge below dismissed the Strike Out Application. The appellant replied and the matter laid dormant until the respondent applied to re-amend its Defence. Leave was granted and a re-amended Defence was filed.

By its re-amended Defence the respondent asserted that the matter was statute barred as it had not been brought within the three-year limitation period for the commencement of an action to recover damages relative to personal injuries. By virtue of an amended Reply, the appellant alleged that the claim was not statute barred, but if it was, the respondent had waived limitation and submitted to the jurisdiction of the court by entering an unconditional appearance. A second Strike Out Application was made by the respondent on the basis that the claim was statute barred. The learned judge below dismissed the appellant's action against the respondent and awarded the respondent its costs. The appellant now appeals that decision.

Held: appeal dismissed. The appellant is to pay the costs of the appeal to the respondent. Such costs are to be taxed if not agreed.

The appellant submits that the respondent, not having raised the issue of limitation in its first Strike Out Application, the principle of res judicata applied. She submits, in essence, that if a party is seeking to raise an issue which could have been raised before it is an abuse of the process of the court and the principle of res judicata applies. The general principle is that a party who raises a particular issue is the one who has the burden of proving that issue. At the second Strike-Out hearing it was the appellant who was asserting that the respondent's reliance on the limitation defence constituted an abuse of the process of the court as the issue was res judicata. The failure to lead any evidence was fatal to the appellant's objection to the learned judge giving consideration to the limitation defence which had been pleaded. The appellant led no evidence of any prejudice, perceived or real, which could satisfy the judge that it would be unfair to consider the limitation defence.

Relative to whether the appellant's claim was statute barred, the appellant submits that the judge erred in finding that the claim was statute barred as knowledge of the identity of the defendant is crucial for the purposes of computation of the limitation period; she says the identity of the proper defendant remained extant. Once limitation is raised as a defence, the burden of proving that the claim is not out of time rests on the plaintiff. The evidence before the judge below revealed that the accident occurred on 6 January 2011 and the Writ of Summons was filed on 6 January 2016. There was no Affidavit placed before the judge which could justify the five-year delay. In the absence of Affidavit evidence explaining the delay it cannot be said that the judge fell into error by accepting the respondent's submission that the claim was statute barred.

Arnold and others v National Westminster Bank plc [1990] 1 All ER 529 considered
Bradford & Binley Building Society v Seddon (Hancock and ors, t/a Hancocks (a firm), third parties) [1999] 1 WLR 1482 considered
Cressey v E Timm & Son Ltd and another; (Practice Note) [2005] 1 WLR 3926 considered
Crocker v British Coal Corporation (1996) 29 BMLR 159 considered

Girten v. Andreu [1998] BHS J. No. 164 considered
Greehalgh v Mallard [1947] 2 ALL ER 255 considered
Henderson v Henderson [1843-60] All ER Rep 378 considered
*Henderson v Temple Pier Co. Ltd***.** [1998] 3 All ER 324 mentioned
Hunter v Chief Constable of the West Midlands Police and others [1982] 1 AC 529 considered
Johnson v Gore Wood & Co. (a firm) [2001] 1 BCLC 313 considered
Kensell v Khoury and another [2020] EWHC 567 (Ch) mentioned
Neilly v Federal Management Systems (Bahamas) Ltd [2011] 2 BHS J. No. 21 mentioned
Ronex Properties Ltd. v. John Laing Construction Ltd. et al [1983] QB 398 considered
Ruttle Plant Hire Ltd v Secretary of State for the Environment, Food and Rural Affairs [2007] EWHC 1773 (TCC) mentioned
Tannu v Moosajee [2003] EWCA Civ 815 mentioned
Tobias Gruber and another v AIG Management France SA and another [2019] EWHC 1676 (Comm) mentioned
Yat Tung Co. Ltd. v Dao Heng Bank Ltd. [1975] A.C 581 considered

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J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Evans, JA:

1. This is an appeal from the order of Newton, J. made on 12 May 2021 whereby the learned judge acceded to an application by the respondent and struck out the appellant's Writ of Summons on the basis that it was statue barred.

BACKGROUND

2. The appellant, by Writ of Summons filed on 6 January 2016, commenced an action against the respondent as the first defendant and the Nassau Airport Development Company (hereinafter "NAD") as the second defendant. The endorsement on the said Writ of Summons was as follows:

> **"ENDORSEMENT OF CLAIM**
>
> **(i) The Plaintiff (sic) claim is against the Defendants and each of them jointly and severally, for damages for pain and suffering sustained as (sic) result of an accident which occurred on the 6th January A.D., 2011 in the execution of her duties which said accident resulted from the negligence of the Defendants and each of them.**
>
> **(ii) Damages for personal injuries.**

(iii) Interest on all sums due pursuant to the Civil Procedure (Award of Interest) Act;

(iv) Such further or other relief, and

(v) Costs"

3. On 8 December 2016 the appellant filed her Statement of Claim which set out the allegations against the defendants to the action in the following terms:

"1. At all relevant times the Plaintiff was employed by the 1st defendant as a Surveillance supervisor at the Lynden Pindling International Airport (LPIA) for a period of 7 years.

2. At all material times the 1st Defendant is and was a body corporate established to manage maintain and operate LPIA.

3. On the 6th January 2011, in the course of employment, the Plaintiff was reporting for duty in the CCTV monitoring room at the LPIA when due to the slippery substance used to clean the floor, she slipped and fell sustaining injury.

4. The Plaintiffs accident was caused by the negligence and or breach of statutory duty of the defendant, its employees or agents acting in the course of their employment.

DETAILED ALLEGATIONS OF NEGLIGENCE AND/OR BREACH OF STATUTORY DUTY

1. The Plaintiff will say that the fact and circumstances of the accident speak for themselves and are of themselves evidence of the negligence and breach of statutory duty of the 1st Defendant.

2. Alternatively, the 1st Defendant is guilty of negligence or breach of statutory duty by their acts or omissions in:

(a) causing or permitting the use of (sic) slippery substance to be used to clean the floor.

(b) failing to cause the use of (sic) slippery substance to be properly mopped up and removed.

(c) Failing to institute or enforce any or any adequate system of housekeeping or cleaning of the

premises whereby the presence of the substance upon the floor might have been detected and the same removed before the Plaintiff's accident.

(d) failing to keep the floor free from slippery substances that might cause persons to slip, trip or fall contrary to Section 4 of the Health and Safety at Work Act or at all.

(e) Failing to provide the Plaintiff with a safe place of work and exposing her to an unnecessary risk of injury.

5 (sic). As a result, the Plaintiff has suffered personal injury and consequential loss."

4. The respondent filed a Defence to the Statement of Claim on 24 January 2017 which provided as follows:

"1. This is a Defence in response to the Statement of Claim in this matter filed on the 8th day of December A.D., 2016 (hereinafter referred to as "the SOC").

2. Paragraphs 1 and 2 of the SOC are admitted.

3. The Plaintiff is put to strict proof that a slippery substance, which was used to clean the floor, caused her fall. Paragraph 3 of the SOC is otherwise admitted.

4. Paragraph 4 of the SOC is denied, and the First Defendant avers that the Plaintiff fell of her own volition by means not associated or connected with the First Defendant.

5. Under the Detailed allegations of negligence and/or breach of statutory duty heading in the SOC, the First Defendant avers that the fact and circumstances do not speak for themselves. The Plaintiff could have tripped, or slipped due to the make of her shoes, her balance at the material time or as the result of her preexisting condition, which causes, among other things, weakness in the dorsiflexors of the left foot and ankle.

6. Paragraph 2, subparagraphs a-e are denied, and the Plaintiff is put to strict proof that this substance existed, that it was at the place at the material time, and that it was left there by an employee agent or other

representative of the First Defendant in the course of their employment.

7. As to paragraph 5, the Plaintiff is put to strict proof of each and every injury allegedly suffered, and that those injuries are all directly connected to a slip which the First Defendant caused, allowed, or failed to prevent.

8. As to paragraph 6 (including the schedule of past and future losses) and 7, The Plaintiff is put to strict proof of each and every sum claimed for general and special damages suffered by her. Paragraph (sic) 6 and 7 is (sic) otherwise denied."

5. As is evident, the Defence raised no issues relative to the respondent not being a proper party to the action nor to the Writ having been filed outside of the limitation period. The Defence took no position, save to deny certain allegations while others were not admitted, and the appellant was put to strict proof of the allegations made.

6. The respondent filed a Summons on 19 May 2017 seeking leave to amend the Defence. The said Summons was supported by an Affidavit filed on the same date and sworn by Miranda Adderley wherein she stated that:

"6. Nearing the end of March, Counsel was furnished with a response from the First Defendant, as well as evidence, which the First Defendant contends would exonerate the First Defendant from liability of the alleged incident pleaded in the Plaintiff's Statement of Claim.

7. The Plaintiff craves the indulgence and leave of the Court to amend its Defence to reflect this new evidence, so that the First Defendant's case may be properly laid before the Court. There is now exhibited and shown to me marked "MA 1" the draft Amended Defence of the First Defendant."

7. The application was granted by Order dated 21 June 2017 and the amended Defence which was filed on 29 June 2017 was in the following terms:

"1 This is a Defence in response to the Statement of Claim in this matter filed on the 8th day of December A.D., 2016 (hereinafter referred to as "the SOC").

2. Paragraphs 1 and 2 of the SOC are admitted.

3. The Plaintiff is put to strict proof that a slippery substance, which was used to clean the floor, caused her

fall. According to the CCTV footage of the area in which the alleged incident occurred, the Plaintiff did not slip on any slippery substance alleged to have been left by any officer, employee or agent of the First Defendant. The said footage would reveal that no substance had been used on the area in which the Plaintiff alleges to have slipped, within one hours time, making it impossible for any slippery substance to have caused a fall to anyone. We aver that the Plaintiff tripped over her own shoe in proceeding with haste to get to her station. Further, that in that on-hour (sic) time frame, several other people used that common area and did not experience any issues in walking across it. Paragraph 3 of the SOC is otherwise admitted.

4. Paragraph 4 of the SOC is denied, and the First Defendant avers that the Plaintiff fell of her own volition by means not associated or connected with the First Defendant. The portion of the airport where your client would have fallen is under the control of Nassau Airport Development ("NAD") as per a transfer agreement executed between our client and NAD, which came into effect on the 1st of April, 2007. The First Defendant is therefore not liable for any incident which is alleged to have occurred in that area, and denies all liability therein.

5. Under the Detailed allegations of negligence and/or breach of statutory duty heading in the SOC, the First Defendant avers that the fact and circumstances do not speak for themselves. The Plaintiff ~~could have~~ tripped, or slipped due to the make of her shoes, her balance at the material time, or as the result of her preexisting condition, which causes, among other things, weakness in the dorsiflexors of the left foot and ankle, as indicted (sic) in the Plaintiff's Medical Report.

6. Paragraph 2, subparagraphs a-e are denied, and the Plaintiff is put to strict proof that this substance existed, that it was at the place at the material time, and that it was left there by an employee agent or other representative of the First Defendant in the course of their employment.

7. As to paragraph 5, the Plaintiff is put to strict proof of each and every injury allegedly suffered, and that those

injuries are all directly connected to a slip, which the First Defendant caused, allowed, or failed to prevent.

8. As to paragraph 6 (including the schedule of past and future losses) and 7, The Plaintiff is put to strict proof of each and every sum claimed for general and special damages suffered by her. Paragraph 6 and 7 is otherwise denied.

9. Based on the foregoing, The First Defendant takes the position that it is not liable for negligence, or any other breach of statutory or common-law duty, with (sic) respect the Plaintiff's alleged injuries."

8. On 20 June 2017 the respondent filed a Summons making an application that the Statement of Claim filed on 8 December 2016 **"be struck out as against the First Defendant on the grounds that the Claim is Scandalous, frivolous and vexatious and is otherwise an abuse of the process of the Court".**

9. The aforesaid Summons was supported by an Affidavit sworn by Milo Butler III, General Manager, of the Airport Authority, filed on 20 June 2017. In his affidavit Mr. Butler stated as follows:

"3. That I make this Affidavit in support of an application to strike out the Plaintiff's Statement of Claim as against the First Defendant, on the grounds that the Plaintiff has no cause of action against the First Defendant, and the Claim is further scandalous, frivolous, and vexatious, and further that it is an abuse of the Court's process.

4. That on or about the 6th day of March A.D., 2017, we instructed our attorneys Messrs. Laroda, Francis & Co., to deliver a copy of an Agreement between the First and Second Defendants, which was executed and took effect from the 1st day of April A.D., 2007 (hereinafter referred to as "the Agreement"). This Agreement contained the explicit terms upon which the First Defendant absolved itself of certain property, responsibilities and liabilities, and thereby transferred the same to the Second Defendant, to be held and operated by them solely.

5. That the First and Second Defendant are two separate legal entities, and neither is run, or operated by the other, whatsoever. This is supported by the terms of the Agreement, which is a legally binding document. There is now exhibited and shown to me marked "MB 1" a copy

of the Agreement duly executed by agents of the First and Second Defendants herein.

6. That subparagraph (a) on page 10 of the Agreement states that the First Defendant shall cease to perform the "Functions" as defined in recital A, and the Operator, that is the Second Defendant herein, shall as of the Handover Date, being the 1st day of April aforesaid, perform the same in its stead. Recital A of the Agreement states at subparagraph (a) at page 1, "to manage, maintain and operate the airport". This is repeated at paragraph 2.1 of the Agreement at page 9.

7. That subparagraph (a) on page 11 of the Agreement states that the Operator, that is, the Second Defendant, is a corporation duly created and validly existing under the laws of the Commonwealth of The Bahamas and has full power and capacity (my emphasis) to enter into, carry out the transactions contemplated by and duly observe and perform all its obligations contained in this Agreement and all documents, instruments and agreements required to be executed and delivered by the Second Defendant pursuant to this Agreement.

8. That paragraph 7.2 of the Agreement, states that the Second Defendant confirms that all Assumed Liabilities, that is, any and all liabilities and obligations arising or accruing on or after the 1st day of April aforementioned, are for the account of the Second Defendant. Further, that the Second Defendant agrees to Defend at it's sole cost and expense, any suit, action or proceeding instituted against the First Defendant, its directors, officers, employees or agents and to indemnify and (sic) the First Defendant, its directors, officers, employees, and agents, harmless from and against any damages, liabilities, costs and expenses whatsoever, (including all reasonable professional fees and expenses) arising directly, or indirectly out of (i) the said Assumed Liabilities, and (ii) the Second Defendant's use, occupancy or operation of the Demised Premises after the 1st of April, aforesaid.

9. That the Demised Premises comprises the portion of the Airport where the alleged incident is said to have occurred. There is now exhibited and shown to me marked "MB 2" the Lease agreement between the First

and Second Defendants, which defines the area in which the alleged incident took place, as the Demised Premises referred to in the Agreement as having been demised to the Second Defendant.

10. That paragraph 10.3 of the Agreement at page 19, makes clear that the First and Second Defendants expressly disclaim any intention to create a partnership, joint venture, or enterprise. It is understood, acknowledged and agreed that the Second Defendant is an independent contractor and nothing contained in this agreement nor any acts of the First Defendant or the Second Defendant shall constitute or shall be deemed to constitute the First and Second Defendant as partners, joint venturers, principal and agent (my emphasis) or any relationship which would constitute the Second Defendant as anything other than an independent contractor. Therefore, not only did the First Defendant have no control over the area constituting demised premises where the Plaintiff alleges she slipped, but the First Defendant also had no control over how the Second Defendant operated or maintained that part of the Airport. The Plaintiff has had notice of these facts at least from the 6th day of March, aforesaid.

11. That notwithstanding this Agreement and/or the relevant portions outlined having been provided by our attorneys, to the Plaintiff, the Plaintiff continues to prosecute this action with no regard (sic) the fact that no appearance by NAD has been entered, or no indication that NAD has been duly served (sic) these proceedings.

12. That to continue to prosecute this claim against the First Defendant is scandalous, frivolous and vexatious, and further constitutes an abuse of the Court's process. Consequently, we crave the leave of the Honourable Court to strike out the Statement of Claim as against the First Defendant, and provide an award of costs to the First Defendant for this action."

10. The Strike Out application was heard on 23 November 2017 and the learned trial judge delivered an oral decision on 15 March 2018 wherein she dismissed the Strike Out Application, gave trial directions and awarded the appellant / plaintiff its costs against the respondent / first defendant.

11. The appellant thereafter filed her Reply, to the respondent's amended Defence, on 18 July 2017, which was in the following terms:

> **"1. Except as set out below, and except where it contains admissions the Plaintiff requires the 1st Defendant to prove the matters set out in the Amended Defence.**
>
> **2. As to paragraph 3 of the Amended Defence the Plaintiff admits that there is a CCTV footage of the slip and fall which footage is dated the 6 January 2011. The accident occurred shortly after the Plaintiff had reported for duty for the 11 pm shift. While entering the area the Plaintiff's left leg slipped on the floor and on landing the Plaintiff slid across the floor. At 1:19 am on the 7th January 2011 the Plaintiff was admitted to Princess Margaret Hospital to receive treatment for her injuries. On the 23rd May 2012 the 1st Defendant expressly stated that the "employee [was] advised to be more mindful of damp areas within the airport" and admitted that the Plaintiff landed and slid across the floor. The 1st Defendant is required to prove the remaining allegations in paragraph 3 of its Amended Defence.**
>
> **3. As to paragraph 4 of the Amended Defence the Plaintiff avers that the Transfer Agreement is an agreement between the 1st and 2nd Defendants whereby the second Defendant agreed to carry out certain defined obligations of the 1st Defendant as the independent contractor for the 1st Defendant. Privity of contract excludes the agreement being enforceable by any person other than the parties to the agreement. As such breach of the provisions of the agreement can be enforced only by the 1st Defendant against the 2nd Defendant as its independent contractor."**

12. The matter was dormant for a period of time until there was a change of attorneys for the respondent in 2020 and application was made by Summons dated 8 December 2020 to re-amend the Defence. The court granted leave for the amendment and a re-amended Defence was filed on 9 December 2020. The salient issue raised by the new amendment was set out in paragraph 9 where, after speaking directly to the particulars of the claim, the respondent stated as follows:

> **"9. Based on the foregoing, The First Defendant takes the position that it is not liable for negligence, or any breach of Statutory or Common-law duty with respect to the Plaintiff's accident and/or alleged injuries. Moreover, the First Defendant avers that this matter is Statute Barred**

as it was not brought within the Three (3) year limitation period for the commencement of an action to recover damages for personal injury."

13. The appellant filed her amended Reply on 22 December 2020 and in addressing the limitation issue averred as follows:

> **"4. On the 29th January 2016 the 1st Defendant entered an unconditional appearance to the action herein which said appearance amounts to a waiver and a submission to the jurisdiction of the court. On the 20 June 2017 the 1st Defendant by Summons applied for an order pursuant to Order 18 r 19. The said application was heard on the merits and dismissed. If limitation applies, which is denied, the presumption of waiver applies which bars the application of and the reliance by the 1st Defendant on the Limitation defence.**
>
> **5. Further or alternatively, the Plaintiff will say that it was the 1st Defendant's medical examiner who determined by letter dated the 20 March 2014 that the Plaintiff was permanently disabled as a result of the slip and fall accident. The 1st Defendant concealed the results of the said report from the Plaintiff until years later when it was disclosed. The date of knowledge for the purposes of the Limitation Act did not run until at the earliest, March 2014,**
>
> **6. In the above circumstances the Plaintiff avers that the claim herein is not barred as alleged or at all."**

14. The next development was the filing by the respondent of a Summons on 5 January 2021 making an application **"pursuant to Order 18 rule 19 (1) (b) and (d) of the Rules of the Supreme Court 1978 and under the Inherent Jurisdiction of the Court for an Order granting leave to Strike out the Statement of Claim and the action on the ground that it is frivolous or vexatious or otherwise an abuse of the process of the Court."** The grounds on which the second Strike Out Application was based were as follows:

> **"1. This matter is Statute barred as the action was brought more than Three (3) years after the alleged accident occurred. Therefore, the Plaintiff is in breach of Section 9 (2) (a) of the Limitation Act.**
>
> **2. That the Plaintiff has failed to plead any material facts, in her Generally Indorsed Writ of Summons or the Statement of Claim, which establishes a legally complete**

or viable cause of action under Section 9 (2) (b) of the Limitation Act, namely, that the Plaintiff's action was precipitated on her later date of knowledge; and

3. The Plaintiff's pleadings, namely, her Generally Indorsed Writ of Summons and the Statement of Claim embarrasses and is prejudicial to the First Defendant because it concealed a material fact in issue between the parties. Most importantly, the First Defendant has been unfairly prevented from responding to and defending the material fact in issue as the Plaintiff merely pled the same in her Re-Amended Reply, to which the First Defendant cannot respond.

AND that the costs of this application and the action be paid by the Plaintiff to the First Defendant to be taxed if not agreed."

15. The Summons was supported by an Affidavit sworn by Sandra Fountain which was also filed on 5 January 2021. The salient portion of that Affidavit is seen in the following extracts:

"3. That this action has its genesis in a slip and fall which occurred on the 6th day of January, A.D., 2011, at premises under the direct control of the Second Defendant.

4. That the Plaintiff thereafter commenced an action by a Generally Indorsed Writ of Summons, which was filed herein on the 6th day of January, A.D., 2016, approximately Five (5) years after the slip and fall occurred. There is now shown and produced to me a true of copy of the Writ marked "Exhibit SF1".

…

10. That under section 9(2)(a) of the Limitation Act , all personal injury actions should be brought within Three (3) years from the date that the accident occurred or the date (if later) of the Plaintiff's knowledge. The Plaintiff, in this matter, commenced an action exactly Five (5) years after the accident occurred and as a result this matter is Statute barred and outside of the Limitation period.

…

16. That the First Defendant therefore submits that this matter should be dismissed for being frivolous or

vexatious or otherwise an abuse of the process of the Court as it was brought after the Three (3) year Limitation period had expired in breach of Section 9 (2) (a) of the Limitation Act. Most importantly, the Plaintiff has not pleaded one scintilla of evidence which support (sic) her claim of a later date of knowledge.

17. That moreover, even if the Court accepts the Plaintiff's claim of a later date of knowledge, by the Plaintiff's own admission in her Statement of Claim and her Witness Statement, she was obligated to commence an action from as early as June, A.D, 2015.

18. That the Plaintiff, at paragraph 24 of her Witness Statement, recites that on the 22nd day of June, A.D., 2012, she was seen by Dr. Valentine Grimes who diagnosed her as having sustained Lumbar Radiculopathy and Cervical Radiculopathy. There is now shown and produced to me a true of copy of a medical report from Dr. Valentine Grimes marked "Exhibit SF7".

19. That by the aforementioned admission from the Plaintiff (See TAB 8 for a copy of the Witness Statement), the Plaintiff was obliged to commence an action within Three (3) years from that date, i.e. on or before the 22nd day of June, A.D., 2015, for the following reasons:-

> **i. On the 22 day of June, A.D., 2012, the Plaintiff was aware that the injury was significant based on the symptoms she was experiencing;**
>
> **ii. Dr. Grimes correlated her ongoing symptoms to her slip and fall;**
>
> **iii. The identity of the Airport Authority and/or Nassau Airport Development Company was known and identifiable; and**
>
> **iv. Any reasonable person who would have received the medical report which the Plaintiff did along with the medical findings from Dr. Grimes would have reasonably considered the injury serious enough to institute proceedings for negligence.**

20. That additionally, the Plaintiff, by her own admission, under the Heading "(e) PROGNOSIS", in her Statement

of Claim, relies on "Early medical reports about the personal injuries" which she alleges she sustained. One of these reports (namely from Dr. Robert Gibson) date back to as early as the 10th day of October, A.D., 2012. There is now shown and produced to me a true of copy of a medical report from Dr. Robert Gibson marked "Exhibit SF9".

21. That the aforementioned report states that the Plaintiff's symptoms had become progressively worse and that the symptoms which she presented were directly related to her fall in January, A.D., 2011. Therefore, the Plaintiff should have commenced an action within Three (3) years from that date, i.e. on or before the 10th day of October, A.D., 2015, for the following reasons:-

i On the 10th day of October, A.D., 2012, the Plaintiff was aware that the injury was significant based on the symptoms she was experiencing;

ii. Dr. Gibson in his report clearly correlated her ongoing symptoms to her slip and fall;

iii, The identity of the Airport Authority and/or Nassau Airport Development Company was known and identifiable; and

iv. Any reasonable person experiencing the symptoms which the Plaintiff did and who was directed by a Medical expert to be assessed by a Neurologist for further medical care and to continue with further Physical Therapy, would have reasonably considered the injury serious enough to institute proceedings for negligence.

22. That the latest date on which the plaintiff can rely, as her date of knowledge, is the 10th day of October, AD, 2012, because at that date the Plaintiff knew that her injuries were sufficiently serious to institute proceedings for negligence. Therefore, proceedings should have been commenced on or before the 10th day of October AD 2015…"

16. The appellant did not file an Affidavit in reply to the second Strike Out Application, but defended the application by way of oral and written submissions.

17. The learned judge heard the application on 26 January 2021 and reserved her Ruling. On 12 May 2021 the learned judge delivered an oral Ruling wherein she dismissed the appellant's action against the respondent.

18. At the request of this Court the learned judge provided a record of her oral Ruling, but no formal written Ruling was produced. However, the terms of her oral Ruling, as disclosed from her notes, were as follows:

> **"1. The instant application on behalf of the First Defendant (the Defendant) is for the Plaintiff's claim for damages for personal injuries as a result of the Defendant's negligence to be struck out pursuant to Order 18 rule 19 (1)(b) and (d) of the Rules of the Supreme Court and under the inherent jurisdiction of the court.**
>
> **2. The Defendant contends that the action is statute barred having commenced some five years after the accident occurred. (The accident having occurred in January 2011 and the action commenced in 2016).**
>
> **3. The Defendant say (sic) that the action is outside Section 9 of the Statute of Limitation. Further that the Plaintiff did not plead date of knowledge pursuant to Section 9(2) of the Act.**
>
> **4. The Plaintiff's opposition to the application is that the Defendants are estopped from raising the Limitation issue as it ought to have been raised at an earlier application to strike out. Alternatively the Plaintiff denies that the action is statue barred on the basis that time did not begin to run until the Plaintiff's knowledge of the injuries which knowledge was in 2014.**
>
> **5. I do not agree with the Plaintiff that the Defendant can no longer raise the Limitation issue. In the earlier application the Defendant argued that they were not the Plaintiff's employers and therefore there is no cause of action against them, this application, however, failed.**
>
> **6. The instant application is a completely different issue. The Defendant is stating that the action should be struck out as an abuse of the court's process on the grounds that it is statute barred.**

7. I also do not accept, as the Plaintiff stated, that she became aware of her injuries in March 2014. Her Statement of Claim puts her knowledge to June 2012, the date of Dr Valentine Grimes' Report or latest October 2012 the date of Dr Robert Gibson's Report. The Plaintiff was aware from the time she visited her own doctor and was able to relate her injuries directly to the alleged negligence of the Defendants.

8. I accept the Defendant's argument that the action is statute barred as the time of the Plaintiff's knowledge according to the Limitation Act is calculated from October 2012 the latest. Thus the time would have expired, October 2015 the latest. The action is dismissed on the ground that it is statute barred and therefore an abuse of the court's process.

9. Costs to the First Defendant."

19. I pause here to observe that whereas there are occasions where mere oral rulings are appropriate, decisions of this nature are not in my view numbered among them. In a case where a litigant's claim is being struck out after full submissions judicial officers ought to be mindful of the likelihood of an appeal and the need for a proper record. Additionally, the general importance of that litigant understanding the full considered reasons why the claim is being dismissed is necessary to maintain public confidence in the judicial process.

THE APPEAL

20. The appellant made application for leave to appeal that Ruling, by Summons dated 26 May 2021 and filed in the Supreme Court. The application was granted on 21 September 2021. The appellant subsequently filed her Notice of Appeal on 29 September 2021 which was subsequently amended on 9 May 2022 and the appeal proceeded on the following amended grounds:

"1. The judge erred when she struck out the Appellant's claim on the grounds that the claim was statute barred under the Limitation Act. The evidence and the pleadings show that the Respondent denies responsibility for the incident which caused the Appellant's injuries and pleaded that it is not (sic) proper Defendant to the action.

2. Knowledge for the purposes of the computation of the relevant limitation period requires inter alia knowledge of the identity of the Defendant. The Respondent contended that the Appellant first had knowledge of the identity of the proper Defendant in March 2014 and that

the injury was not attributable to acts or omissions on its part.

3. The Learned judge ought to have found that the date of knowledge must satisfy the requirements of s. 10 of the Limitation Act i.e the injury was significant, the injury was attributable in whole or in part to the acts or omission which is to constitute negligence and the identity of the Defendant [emphasis added].

4. The issue as to the identity of the Defendant remains a live issue. The Respondent admitted that the Appellant only became aware of the identity of the proper Defendant in March 2014 and denies that the injury was caused by negligence on its part.

5. The judge erred in finding that the Appellant must pay the Respondent's costs. As there is no limitation issue the judge ought to have found that the Writ was filed in time; dismissed the Respondent's application and ordered the Respondent to pay the Appellant's costs.

6. The judge failed to consider relevant issues including whether or not the injury was caused by the negligence of the Appellant's employer or whether the Respondent was in breach of the duty to provide safe working conditions for the Appellant. The judge treated as proven the allegation by the Respondent that the injury occurred on the portion of the airport which is under the control of NAD. This allegation remains a live issue.

7. The judge failed to determine the fundamental issue of the pleadings: is NAD the proper Defendant and whether on a review of the agreement between NAD and the Respondent, the conclusion arrived at by the Respondent can be supported.

8. The Judge (sic) in dismissing the writ without first determining whether the respondent was in breach of its duty to the Appellant by permitting a slippery substance to be used at the Appellant's place of employment.

9. The Judge erred in finding at paragraph 7 that 'the plaintiff was aware from the time she visited her own doctor and was able to relate her injuries directly to the alleged negligence of the Defendant'. The evidence before

the judge was that the plaintiff obtained knowledge that a 3rd party might have been responsible for her injury on the 6th March 2017 when the same was disclosed in the affidavit of Milo Butler III. Whether the 3rd party is in fact responsible remains a live issue.

10. The judge failed to consider the effect of the denial of liability by the Respondent on the issue of negligence and causation. The judge treated the assertion by the Respondent that it was not negligent as factual.

11. The judge erred and misdirected herself in law when she found that the Respondent is not estopped from raising the limitation issue. The documents before the learned judge revealed that the Respondent by application filed on the 20 June 2017 sought an order striking out the Plaintiff's claim pursuant to Order 18 rule 19. By order dated the 29 May 2019 the court dismissed the strike out application and ordered 'the application to strike out the Plaintiff's claim against the 1st Defendant be and is hereby dismissed.'. The Learned judge ought to have found that the Respondent ought to have raised the limitation point in its 20th June 2017 application. As it failed to do so, issue estoppel barred the raising of the point by a subsequent application."

THE LAW

21. The application before the trial judge was brought pursuant to Order 18 rule 19 (1) (b) and (d) of the Rules of the Supreme Court 1978 which provides as follows:

"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, 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).**
>
> **(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading." [Emphasis added]**

22. The operation of these provisions are well known**.** In **Ronex Properties Ltd. v. John Laing Construction Ltd. et al** [1983] QB 398, Stephenson, LJ opined at page 408 that:

> **"…There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiffs' claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute-barred. Then the plaintiff and the court know that the Statute of Limitations will be pleaded; the defendant can, if necessary, file evidence to that effect; the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process…" [Emphasis added]**

23. In **Girten v. Andreu** [1998] BHS J. No. 164 Sawyer, CJ observed as follows:

> **"20. Mr. Wallace Whitfield also submits, among other things, that the issue of the limitation period under the Act having expired prior to the bringing of this action is a matter which should be left for the trial. I think it is now trite law that where it is clear from the statement of claim that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the limitation defence and there is nothing before the court to suggest that the plaintiff could escape from that defence the claim will be struck out as being frivolous, vexatious and an abuse of the process of the court - see e.g., Riches v. Director of Public Prosecutions [1973] 1 WLR 1019; [1973] 2 All E.R. 935 as explained in Ronex Properties Ltd. v. John Laing Construction Ltd. [1983] Q.B. 398; [1982] 3 All E.R. 961.**

In the latter case, at page 404 - 405, Donaldson, L.J., when dealing with the issue of whether or not a defence under the Limitation Act had to be pleaded, said:

> **'... The matter is not in fact free from authority. It was considered in Riches v. Director of Public Prosecutions ... in which the earlier cases are reviewed. There the grounds put forward in support of the application to strike out included an allegation that the claim was frivolous and vexatious and an abuse of the process of the court. Accordingly, the court was able to consider evidence and it is understandable that the claim could be struck out ... Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, <u>in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.'</u>" [Emphasis added]**

24. Sections 9 and 10 of the Limitation Act 1995 are also relevant to this matter and are in the following terms:

> **"9. (1) Subject to subsection (6), this section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by any written law or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.**
>
> **(2) Subject to subsection (3), an action to which this section applies shall not be brought after the expiry of three years from —**
>
> **(a) the date on which the cause of action accrued; or**
>
> **(b) the date (if later) of the plaintiff's knowledge.**

(3) If the person injured dies before the expiry of the period prescribed by subsection (2), the period as regards the cause of action surviving for the benefit of the estate of the deceased shall be three years from —

(a) the date of death; or

(b) the date of the personal representative's knowledge;

whichever is the later.

(4) For the purposes of this section, "personal representative" includes any person who is or has been a personal representative of the deceased and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(5) If there is more than one personal representative and their dates of knowledge are different, subsection (3) shall be read as referring to the earliest of those dates.

(6) This section shall not apply to an action to which section 12 applies or to an action under the Fatal Accidents Act.

10. (1) In section 9, references to a person's date of knowledge are references to the date on which that person first had knowledge of the following facts —

(a) that the injury in question was significant;

(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) For the purposes of this section, an injury is significant if the plaintiff would reasonably have considered it

sufficiently serious to justify the institution of proceedings against a defendant who did not dispute liability and was able to satisfy a judgment.

(3) For the purposes of this section, a person's knowledge includes knowledge which such person might reasonably be expected to acquire —

(a) from facts observable or ascertainable by such person; or

(b) from facts ascertainable by such person with the help of such medical or other expert advice as it is reasonable, in the circumstances, to seek,

but there shall not be attributed to a person by virtue of this subsection knowledge of a fact ascertainable only with the help of expert advice so long as the person has taken all reasonable steps to obtain (and where appropriate to act on) that advice."

THE ISSUES TO BE DECIDED ON THE APPEAL

25. Although the appellant has filed eleven (11) grounds of appeal those grounds give rise to two main issues for this Court to determine. The first issue is whether the respondent was estopped from raising the limitation issue in the second application made to strike out the action. This issue emanates from ground 11 which is in the following terms:

> "**11. The judge erred and misdirected herself in law when she found that the Respondent is not estopped from raising the limitation issue. The documents before the learned judge revealed that the Respondent by application filed on the 20 June 2017 sought an order striking out the Plaintiff's claim pursuant to Order 18 rule 19. By order dated the 29 May 2019 the court dismissed the strike out application and ordered 'the application to strike out the Plaintiff's claim against the 1st Defendant be and is hereby dismissed.' <u>The Learned judge ought to have found that the Respondent ought to have raised the limitation point in its 20th June 2017 application. As it failed to do so, issue estoppel barred the raising of the point by a subsequent application."</u>** **[Emphasis added]**

26. The second issue is whether the learned judge's finding that the action is statute barred as the time of the appellant's knowledge according to the Limitation Act, as calculated from October

2012, at the latest, is consistent with the evidence. This issue is derived from grounds 1 – 4 and 6 – 10.

27. Ground 5 relates to the issue of costs.

SUBMISSIONS, ANALYSIS AND CONCLUSIONS

RES JUDICATA

28. This issue, raised by the appellant, has its origin in the principle derived from the decision in **Henderson v Henderson** [1843-60] All ER Rep 378 (cited by Lord Bingham in the case of **Johnson v Gore Wood & Co. (a firm)** [2001] 1 BCLC 313) where Wigram VC laid down the rule at pages 381-382 that:

> **"…The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."**

29. This principle has long been recognized by courts in the Commonwealth and has undergone some developments over the years. The view has developed that courts are not confined by the technical requirements necessary to make a finding that a claim is res judicata. That the Court is at liberty to consider all the circumstances of the case with a view to balancing the parties' interests and the interests of justice. Lord Bingham averted to this exercise of the court's inherent jurisdiction in his judgment in **Johnson v Gore Wood,** citing with approval the judgment of Auld, LJ in **Bradford & Binley Building Society v Seddon (Hancock and ors, t/a Hancocks (a firm), third parties)** [1999] 1 WLR.1482, Lord Bingham said at pages 331-332:

> **"…In the course of a judgment with which Nourse and Ward LJJ agreed, Auld LJ said,**
>
> > **'In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts' subsequent application of the above dictum [of Sir James Wigram V-C in Henderson v Henderson]. The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in 'special cases' or 'special circumstances': see Thoday v Thoday [1964] 1 P 181, 197-198, per Diplock LJ, and Arnold v**

National Westminster Bank plc [1991] 2 AC 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter. Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue."

30. In the case of **Yat Tung Co. Ltd. v Dao Heng Bank Ltd.** [1975] A.C 581, Lord Kilbrandon commenting on res judicata at 589 h to 590 a-e said:

> **"The second question depends on the application of a doctrine of estoppel namely, res judicata. Their Lordships agree with the view expressed by McMullen J that the true doctrine in its narrower sense cannot be discerned in the present series of actions ... But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V.C in Henderson v Henderson (1843) 3 Hare 100, 115 where the judge says:**
>
> > **'…where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from negligence,**

> **inadvertence or even accident omitted part of their case. <u>The plea of res judicata applies, except in special cases not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time'"</u>.[[Emphasis added]**

31. Somervell L.J. in the case of **Greehalgh v Mallard** [1947] 2 ALL ER 255 explained what is meant by **"every point which properly belonged to the subject of litigation"** as follows:

> **"... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."**

32. In the case of **Arnold and others v National Westminster Bank plc** [1990] 1 All ER 529, Staughton L.J. said at 541:

> **"…where a party did not raise a particular issue in the earlier proceedings but could and should have done so, he will not normally be allowed to raise that issue in later proceedings (this I would call with somewhat perverse logic, non issue estoppel). But in such a case there may be special circumstances which require that he should still be allowed to raise it in the later proceedings."**

33. Lord Bingham, at pages 332 - 333 of **Johnson v Gore Wood,** articulated what he considered to be the proper approach of a court of justice as follows:

> **"It may very well be, as has been convincingly argued ... that what is now taken to be the rule in Henderson v Henderson, has diverged from the ruling which Wigram V.-C. made, which was address to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on**

> **efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party…"**

DOES THE HENDERSON v HENDERSON PRINCIPLE APPLY TO APPLICATIONS WITHIN THE SAME ACTION?

34. Martin Hutchings, QC in his article "**Amendments to statements of case and the rule in Henderson v Henderson"** analyzed some recent development in this area and observed as follows:

> **"The mischief to which the Henderson rule is therefore primarily directed is the bringing of a second action, not the making of an application to amend the first. Thus in Greenhalgh v Mallard the Court of Appeal characterised the Henderson rule as applying to: 'issues or facts which….clearly could have been raised [such] that it would be an abuse of the process to allow … new proceedings to be started….'. The most recent authoritative case on the Henderson rule (Johnson v Gore Wood & Co (no 1)) was also concerned with the question whether the claim or defence 'should have been raised in the earlier proceedings if it was to be raised at all'. Lord Bingham's statements of principle in that case, including that '….there will rarely be a finding of abuse unless the later proceedings involves what the Court regards as unjust harassment of a party', seem also to confine the rule to circumstances where a second set of proceedings has been issued following the determination of the first. This is also apparent from Bingham MR's earlier statement of principle in Barrow v Bankside Members Agency Ltd:**

> **'The [Henderson] rule is…..a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.' (Emphasis supplied)**
>
> **One could therefore be forgiven for concluding that the danger that the rule in Henderson is designed to meet is the re-litigation of matters in fresh litigation, rather than attempts to amend statements of case to bring forward matters which might have been pleaded earlier in the same proceedings."**

35. Hutchings, QC then considered the recent cases of **Ruttle Plant Hire Ltd v Secretary of State for the Environment, Food and Rural Affairs** [2007] EWHC 1773 (TCC)**; Tannu v Moosajee** [2003] EWCA Civ 815; **Kensell v Khoury and another** [2020] EWHC 567 (Ch) and **Tobias Gruber and another v AIG Management France SA and another** [2019] EWHC 1676 (Comm) where this concept was discussed. He notes however, that in none of the cases was there a specific application of the **Henderson v Henderson** principle but the dicta points clearly to the fact that **"…Courts nowadays will be prepared to consider whether an application to amend following a strike out of part of a claim, or summary judgment, amounts to an abuse of process engaging the Henderson rule**."

36. It is also worth noting that Mrs. Hanna in her supplemental submissions before this Court acknowledged that **"Subsequent to a review of the case law in this area, the Respondent admits that the rule in the Henderson case of issue and action estoppel is applicable to interlocutory matters."**

37. The appellant's position is that the respondent, having accepted that no new evidence or facts had arisen subsequent to its first Strike Out Application, res judicata applies. Ms. Pyfrom relying on the case of **Johnson v Gore Wood**, submitted that the principle is that the court will look at the circumstances of the case and determine whether the party is seeking to raise an issue which could have been raised before. She concludes that if these circumstances are made out, the party is abusing and misusing the process of the court; res judicata applies.

38. Mrs. Hanna in response submitted that ground 11 is essentially an attempt to appeal the learned judge's ruling made on 9 December 2020 (the re-amendment application), whereby (without objection from the appellant) she allowed the respondent to re-amend its Defence to include the limitation issue. Counsel further contended that if the appellant was aggrieved by the learned judge's decision to allow the amendment, she was required to file an appeal (subsequent to obtaining the requisite leave from the learned judge), within fourteen (14) days, pursuant to section 11 (1) (a) of the Court of Appeal Rules.

39. In these circumstances, Mrs. Hanna argued that an appeal by the appellant from the judge's interlocutory order of 9 December 2020 on the re-amendment application was therefore required to be made on or before 23 December 2020. It follows she says that the appellant is now out of time and has not requested leave from the Court below or this Court to file an appeal out of time and cannot now launch an attack on that decision as she is seeking to do.

40. It is clear that on a proper reading of ground 11 the appellant's challenge is that **"The judge erred and misdirected herself in law when she found that the Respondent is not estopped from raising the limitation issue."** The Judge in her decision specifically indicated that:

> "**5. I do not agree with the Plaintiff that the Defendant can no longer raise the Limitation issue. In the earlier application the Defendant argued that they were not the Plaintiff's employers and therefore there is no cause of action against them, this application, however, failed".**

41. Mrs. Hanna contended that the defence of res judicata ought to have been raised and argued before the learned Judge on 9 December 2020, during the amendment application. In my view, having regard to the specific finding of the judge and the error which has been alleged in ground 11 it is clear that during the second Strike Out Application issue had been joined as to whether the respondent was estopped from raising the limitation issue.

42. The issue having been raised during the second Strike Out Application, the judge, as was her duty, resolved the issue. Lord Diplock in **Hunter v Chief Constable of the West Midlands Police and others** [1982] 1 AC 529 refers to this duty at page 536 where he opines that**:**

> **"[There is an] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power." [Emphasis added]**

43. I note Mrs. Hanna's submission that as the appellant acquiesced to the amendment, with full knowledge that the limitation defence was being pleaded, the appellant is precluded from

making an objection at this late stage. Mrs. Hanna is right that the order granting the respondent leave to re-amend its Defence to plead the limitation point cannot be the subject of this appeal. However, the appellant was not barred from defending against the Strike Out Application which was based on the Limitation Act. The appellant is equally entitled to allege as she has done that the learned judge erred when she rejected the appellant's estoppel submission.

44. The difficulty which the appellant faces, however, is that she was required to demonstrate to the learned judge that the respondent was misusing or abusing the process of the court by seeking to rely on the limitation defence which could have been raised before. Mrs. Hanna submits that the appellant failed to demonstrate this to the learned judge because she acquiesced to the re-amendment of the Defence and did not provide Affidavit evidence in the court below to oppose the re-amendment of the Defence or the second Strike Out Application. Therefore, counsel argues there was nothing before the learned judge for her consideration of the issue that supported the allegation that the respondent was misusing or abusing the process of the court.

45. The appellant, in my view, was caught by the maxim actori incumbit onus probandi. The general principle is that a party who raises a particular issue is the one who has the burden of proving that issue. At the second Strike Out hearing it was the appellant who was asserting that the respondent's reliance on the limitation defence constituted an abuse of the process of the court as the issue was res judicata. The failure to lead any evidence was, in my view, fatal to the appellant's objection to the learned judge giving consideration to the limitation defence which had been pleaded. The appellant led no evidence of any prejudice, perceived or real, which could satisfy the judge that it would be unfair to consider the limitation defence. I would, therefore, dismiss ground 11 of the amended Notice of Appeal.

WAS THE APPELLANT'S CLAIM STATUTE BARRED

46. The appellant challenges the judge's decision on this issue on two basic points. Firstly, that the action is statute barred as the time of the appellant's knowledge of the seriousness of her injuries according to the Limitation Act is calculated from October 2012 the latest. Secondly, that the learned judge failed to recognize that knowledge for the purposes of the computation of the relevant limitation period requires, inter alia, knowledge of the identity of the defendant**.** She asserts that the issue as to the identity of the proper defendant remains unresolved and as such it was improper for the judge to make a determination that the action was statute barred while the identity issue remains extant.

47. As noted, earlier subsection 9(2) of the Limitation Act provides that an action to which that section applies shall not be brought after the expiry of three years from - (a) the date on which the cause of action accrued; or (b) the date (if later) of the plaintiff's knowledge.

48. Section 10 (which is set out at paragraph 24 herein) then sets out the details of what constitutes knowledge referred to in section 9(2)(b).

49. It is important to note that once the limitation defence has been raised, the legal burden of proving that the claim falls under section 9 (2) (a) or 9 (2) (b) of the Limitation Act rests on the plaintiff. In the case of **Crocker v British Coal Corporation** (1996) 29 BMLR 159 the court noted that it was not for the defendant to prove that the plaintiff had aquired the knowledge more than three (3) years before the commencement of the action. The following is seen in the headnote:

> **"Held - It was not for the defendants to prove that the plaintiff had the required knowledge more than three years before the commencement of the action. The onus of proof on limitation did not vary according to whether the issue of limitation turned on when the cause of action accrued, or on when the plaintiff first knew of the facts specified in s 14(1) of the Limitation Act 1980. The onus was on the plaintiff in both cases."**

50. Mrs. Hanna submitted that in the normal course of things a plaintiff may seek to discharge the aforementioned burden by pleading the facts in the Writ of Summons and/or Statement of Claim. She notes that in the aforementioned case of **Crocker v British Coal Corporation** the plaintiff specifically pleaded in her Statement of Claim that the action was not statute-barred and claimed a later date of knowledge. The court thereafter went on to consider the issue of limitation based on the pleaded case of the plaintiff.

51. The appellant, in this matter, made no such averment and although she sets out the date of the accident in her Statement of Claim as being 6 January 2011 the Writ nor the Statement of Claim explains why the action was not filed until 6 January 2016. The Statement of Claim does not indicate the dates on which, as per section 10 of the Limitation Act, she became aware "**(a) that the injury in question was significant; (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; or (c) the identity of the defendant(s)..."**

52. It should be noted that nowhere in the appellant's pleadings did she allege that the true identity of the respondent or NAD is/was not known. Further, there is no indication that the appellant raised this point as an issue before the trial judge at the second Strike Out hearing. It is noted that the learned judge did not address this issue in her oral Ruling. This is reinforced by the fact that the appellant led no evidence at that hearing.

53. It was not until she filed her amended Reply that the appellant alleged that time did not start to run until March 2014. She pleaded:

> "…**that it was the 1st Defendant's medical examiner who determined by letter dated the 20 March 2014 that the Plaintiff was permanently disabled as a result of the slip and fall accident. The 1st Defendant concealed the results**

of the said report from the Plaintiff until years later when it was disclosed. The date of knowledge for the purposes of the Limitation Act did not run until at the earliest, March 2014."

54. Mrs. Hanna submitted that this allegation is unsustainable for the following reasons:

> **"1. The Appellant, at paragraph 24 of her Witness Statement, recites that on the 22nd day of June, A.D., 2012, she was seen by Dr. Valentine Grimes who diagnosed her as having sustained Lumbar Radiculopathy and Cervical Radiculopathy. See TAB 6 and page 188 of the Record of Appeal.**
>
> **2. The Appellant, under the Heading "(e) PROGNOSIS", in her Statement of Claim, relies on "Early medical reports about the personal injuries" which she alleges she sustained. One of these reports (namely from Dr. Robert Gibson) date back to as early as the 10th day of October, A.D., 2012. The aforementioned report stated that the Appellant's symptoms had become progressively worse and that the symptoms which she presented were directly related to her fall in January, A.D., 2011; See page 14 of the Record of Appeal.**
>
> **3. The Appellant relied on the aforementioned report to prove her injuries and Dr. Gibson was present at trial to give evidence on her behalf;**
>
> **4. The Appellant's pleaded case of her alleged injuries are the verbatim findings of Dr. Grimes and Dr. Gibson as outlined in their 2012 medical reports. The Appellant in her Statement of Claim recites under the Heading "Principal Injury, Pain and Suffering". The Appellant describes her injury as follows"-**
>
> > **'Degenerative signal decreased and loss of height in the discs from C2 to C7 with associated mild broad-based protruding contour in her disc margins. Focal subligamentous herniation of disc material at C4-5 level. Dextroconex curvature in the spine and accentuated lumbar lordosis. She has been diagnosed with Cervical radiculopathy and lumbar radiculopathy.'**
>
> **(See page 12 of the Record of Appeal)**

> **The aforementioned description of the Appellant's injuries is the verbatim description of her injuries as diagnosed by Dr. Grimes. (See TAB 188 of the Record of Appeal for the Medical Report).**
>
> **5. Moreover, under the heading, "(e) PROGNOSIS", the Appellant relied on the (sic) Dr. Gibson's finding in his 2012 report, that "there is an increase possibility of right sided intracranial 'contra coup'. (See page 191 of the Record of Appeal).**

55. Mrs. Hanna further submitted that the injuries outlined in the reports of Dr. Grimes and Dr. Gibson are the injuries which the appellant was required to prove at trial if she was to be successful in her claim. It therefore follows that if the appellant relied on these reports as proof of her injuries, the learned judge, in the court below, was entitled to rely on these reports as the date of the appellant's requisite knowledge. I accept, therefore, that in these circumstances the learned judge was entitled to find as she did that the time of the appellant's knowledge for the purposes of the Limitation Act is calculated from October 2012 the latest.

56. Ms. Pyfrom contended that the fundamental issue on this appeal is whether there can be a limitation issue when one of two defendants denies that it is the proper defendant and there has been no determination as to which of the two defendants is the proper defendant. As indicated earlier, the appellant filed no affidavit evidence in response to the respondent's application to have the claims against it dismissed. Instead in her written submissions filed for that application she stated as follows:

> **"1. The Plaintiff will rely on the following in support of these submissions:-**
>
> > **(a) Summons of 1st Defendant filed 20 June 2017 ("the Order 19 r 18 application");**
> >
> > **(b) Affidavit of Milo Butler III filed 20 June 2017 ("Butler Affidavit");**
> >
> > **(c) Order dated the 15 March 2018."**

57. The appellant, in her submissions before the learned judge, dealt with the issue of the identity of the defendant as follows:

> **"16. Without prejudice to the res judicata argument the Plaintiff submits that the Defendant's argument on the state of the Plaintiff's knowledge is misconceived.**
>
> **17. The Butler Affidavit exhibited for the first time, an agreement between the 1st Defendant and the 2nd Defendant. The Defendant, in reliance on the terms of the**

agreement (dated 2007) has pleaded in effect, that it is not a proper party to the action (i.e. the Plaintiff has the wrong Defendant).

18. The allegation concerning the identity of the Defendant was first included in the 1st Defendant's Amended Defence filed in 2017.

19. If the effect of the document is as the Defendant has pleaded, the issue of knowledge does not arise as s. 10 requires all of the matters therein to be established to prove knowledge' for limitation purposes.

20. Until an agreement is reached concerning the identity of the Defendant or the court determines this issue knowledge is of no relevance at this stage.

21. Having pleaded and argued that the Plaintiff sued the wrong party, it is not open to the 1st Defendant to say that the Plaintiff had the requisite knowledge (under s. 10 LA) in 2012.

22. Section 10 of the Limitation Act fixes the Plaintiff with the requisite knowledge where the Plaintiff knew (i) that the injury was significant (ii) that the injury was attributable to the act of or omission constituting negligence, nuisance or breach of duty, (iii) and the identity of the defendant:-

> **10. (1) In section 9, references to a person's date of knowledge are references to the date on which that person first had knowledge of the following facts —**
>
> > **(a) that the injury in question was significant;**
> >
> > **(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;**
> >
> > **(c) the identity of the defendant; and**
> >
> > **(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,**

> **and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.**
>
> **23. On the allegations of facts pleaded in the Re-Amended Defence, the issue of the identity of the defendant has not been abandoned; it remains a live issue which must be determined either as a preliminary point or at trial."**

58. Unfortunately, the learned judge in her brief oral Ruling makes no reference to that issue. However, it is beyond dispute that the appellant commenced action against the respondent and sought to continue the proceedings even after being made aware that the respondent was alleging that it was not the entity responsible for the area where the accident occurred. The authorities show that the date of a plaintiff's knowledge of the identity of the defendant might be postponed. However, the length of such postponement depends on the facts of the case, but, in general, it should only be for as long as it would reasonably take to make and complete the appropriate inquiries, unless such inquiries were met by misinformation or a dilatory response. See the cases of **Cressey v E Timm & Son Ltd and another; (Practice Note)** [2005] 1 WLR 3926 and **Henderson v Temple Pier Co. Ltd.** [1998] 3 All ER 324.

59. In **Cressey:**

> **"6. The claimant … Mr. Brian Cressey … worked as a forklift truck driver. His employer was … E Timm & Son Holdings Ltd (the second defendant…); but his pay slips were in the name of an associate company, E Timm & Son Ltd (the first defendant). … The current appeal is between Mr. Cressey and Holdings.**
>
> **7. Mr. Cressey was injured at work on 2 December 2000 when, in the course of using his forklift truck, a pallet collapsed causing another pallet to strike and break his leg. He required immediate medical attention. Save for the question of the identity of his employer, it is common ground that Mr. Cressey then and there had all the knowledge necessary to the commencement of the three-year limitation period for his claim. The issue debated in the courts below and before this court is whether he already then had knowledge of the identity of his defendant. He knew that the defendant would be his employer. But did he know his employer's identity?"**

60. Rix, LJ in delivering the lead judgment observed as follows:

"19 The essential issue, therefore, is whether the date of knowledge when Mr. Cressey first had knowledge of the identity of his defendant was, as Holdings submit, 2 December 2000, the date of the accident, or, as Mr. Cressey submits,30 April 2001, when he first learned of the existence of Holdings. If it is the former, the claim is out of time; if the date of knowledge is the latter, the three years still had one month left to run.

…

27. The court was also referred to Henderson v Temple Pier Co Ltd [1998] 1 WLR 1540. That was not an employee/employer case, but the plaintiff was injured on the gangway of a ship. That was in January 1993. In February 1993 she instructed solicitors who did not discover the name of the owners of the ship until July 1994. Proceedings were not issued until April 1997, which it was said was within three years of the date of knowledge. However, this court held that the plaintiff was fixed with constructive knowledge of the identity of the defendant earlier than three years before April 1997, since, contrary to the submission made on behalf of the plaintiff, that knowledge was not ascertainable "only with the help of expert advice" within the concluding proviso to section 14(3). Bracewell J, with whom Beldam L] agreed, said, at p 1545:

> **'For example he may need expert advice whether the claim should be brought against the occupier, employer, contractor or individual. Having identified the person or persons standing in the appropriate relationship to give rise to a duty, the naming of the party would not, save in the most exceptional circumstances, be a fact ascertainable 'only with the help of expert advice' . . . If solicitors fail to take the appropriate steps to discover the person against whom her action should be brought, she cannot take refuge under section 14(1)(c) because on the face of it the occupier of the St Katherine and the gangway was knowledge which she might reasonably have been expected to acquire from facts obtainable or ascertainable by her. Even if the solicitor is to be regarded as an appropriate**

expert, the facts were ascertainable by him without the use of legal expertise. The proviso is not intended to give an extended period of limitation to a person whose solicitor acts dilatorily in acquiring information which is obtainable without particular expertise . . . It was not a complex inquiry; a site visit would have clarified the name of the ship and enabled speedy inquiries to be made to reveal the occupier.'

Discussion and decision

28 On the particular facts of this case, I do not think that the right answer is hard to reach. It is likely that in most cases of an accident at work, the employee will there and then have knowledge of the identity of his employer, and therefore of the defendant. However, in a minority of cases, where the identity of the employer is uncertain, as in Simpson v Norwest Holst Southern Ltd [1980] 1 WLR 968, or even wrongly stated to the employee, as here, the date of knowledge may well be postponed. How long it will be postponed by will depend on the facts of such cases. In general I do not believe that it can be postponed for long: only as long as it reasonably takes to make and complete the appropriate inquiries. But if such inquiries are met by misinformation, or a dilatory response, again as in Simpson, then it is not possible to be dogmatic about the right conclusion. In Simpson, the court only had to cover a period of about two weeks after the accident and therefore did not have to go further into the facts.

29 In the present case, I agree with the submission that the facts are in their way stronger than in Simpson. Although we have been told nothing about Mr. Cressey's contract of employment, Holdings have been willing to debate the issue at each level on the basis of the pay slips, which identified Ltd as the employer. Significantly, Ltd were still representing themselves as the employer down to 15 June 2001 when they wrote their letter of reference, following Mr. Cressey's earlier redundancy. Thus this case goes beyond Simpson, where the information "Norwest Holst Group" left the matter uncertain. In the present case, Mr. Cressey was misinformed. I do not think that anything turns on Lawton LJ's word "hid".

> **That may reflect a failure of duty to provide a correct employer's name in that case, but in my judgment there is no need, for there to be a lack of relevant knowledge, that the employer is in breach of duty or is deliberately attempting to deceive the employee or to keep him in the dark. It is sufficient that the employee is deprived of the knowledge he needs by being misinformed. In the present case Mr Cressey was misinformed, as has become common ground, and on the evidence before us had no reason to think that any company other than Ltd could be his employer until at earliest the receipt on 30 April 2001 of Zurich's first communication. It is not suggested that Mr. Cressey was dilatory in instructing solicitors, or that his solicitors were dilatory in writing their letter of claim. Thus it is not suggested that, by analogy with Henderson v Temple Pier Co Ltd [1998] 1 WLR 1540, Mr. Cressey should have clarified the name of his employer in a period earlier than it took for Zurich to respond to the solicitors' letter dated 30 March 2001.**
>
> **30 Moreover, I agree with Mr. Mercer that the difference between Ltd and Holdings was more than a difference between mere names and amounted to a difference between identities. There were two separate companies. It was not simply that Mr. Cressey first mistook and then took a little time to pin down the accurate name of his employers, in a situation where there was always only one company." [Emphasis added]**

61. Here again the absence of an Affidavit or any evidence from the appellant looms significant. The appellant has not placed before the Court what, if any, efforts were made to ascertain the identity of the defendant who was responsible. She makes no allegation of seeking answers and being denied information or being misinformed relative to the identity of the respondent. In fact, she makes no assertion that the delay in filing her action was due to any uncertainty as to the identity of the appropriate defendant.

62. In my view, the fact that the appellant filed her Writ of Summons alleging that the respondent was responsible one must assume that she had determined that she had sufficient information to ground her claim. It is also significant that the appellant in her Writ alleged that the two named defendants were alleged to be 'jointly and severally' liable. They were not named alternately so as to indicate that there was uncertainty as to which of them was responsible.

63. The trial judge had before her an Affidavit from the respondent which clearly stated that the appellant had an accident on 6 January 2011, but her Writ of Summons was not filed until 6

January 2016. Unfortunately, the appellant filed no Affidavit in response to explain any circumstances which could justify the five-year delay. Counsel sought to proceed solely on submissions before the judge. It followed that unless the evidence placed before the court by the respondent revealed a justification for the delay which the appellant could rely upon, the appellant had no chance of success.

64. The evidence which the learned judge had available showed that the appellant had medical reports from doctors as early as 2012. One of these reports was from Dr. Robert Gibson dated 10 October 2012. This report stated that the appellant's symptoms had become progressively worse and that the symptoms which she presented were directly related to her fall in January 2011.

65. The action was commenced against the respondent as the first defendant and NAD as the second defendant. The endorsement stated that the plaintiff's claim was against the defendants and each of them jointly and severally, for damages for pain and suffering sustained as result of an accident which occurred on 6 January 2011 in the execution of her duties which said accident resulted from the negligence of the defendants and each of them.

66. It follows that on the face of it the appellant possessed all of the requisite details which constituted the knowledge required by section 9(2) (b) of the Limitation Act as identified by section 10. In these circumstances in the absence of an Affidavit from the appellant explaining why it took five years to file her action I cannot say that the judge fell into error in accepting the respondent's position that the appellant's claim was statute barred.

67. This is an unfortunate case as it is apparent that the appellant sustained serious injuries from her accident. For some unknown reason the Writ of Summons has not been served on the second defendant to the action and obvious difficulties arise from that fact. We have no power to extend the limitation period as is available to a litigant in the United Kingdom. See. **Neilly v Federal Management Systems (Bahamas) Ltd** [2011] 2 BHS J. No. 21. So unfortunately, in my view, we have no alternative than to dismiss grounds 1 – 4 and 6 - 10.

COSTS

68. By ground five the appellant sought a reversal of the costs order made in the court below. Inasmuch as I accept that the trial judge's decision was proper there is no basis to interfere with the costs order imposed. I am, therefore, unable to accede to ground five as that ground was premised on the presumed success of the appeal generally.

DISPOSITION

69. The findings on the above matters, in my view, disposes of all the grounds of appeal.

70. In these circumstances, I would order that the appeal be dismissed, and the appellant is to pay the costs of the appeal to the respondent. Such costs are to be taxed if not agreed.

The Honourable Mr. Justice Evans, JA

71. I agree.

The Honourable Mr. Justice Isaacs, JA

72. I also agree.

The Honourable Madam Justice Crane-Scott, JA