COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/00282

BETWEEN

AMBER ANDERSON-THOMAS

Plaintiff

-AND-

DEEPAK BHATNAGAR

1st Defendant

THE AIRPORT AUTHORITY

2nd Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Romona Farquharson-Seymour for the Plaintiff.
Mr. Stephen Turnquest with him Ms. Syneisha Boodle for the Defendants

Hearing Dates: 06, 31 October 2017

Appeal – Ruling of Assistant Registrar dismissing action in its entirety – Limitation of actions – Application of statute – Trespass to the person - Plaintiff assaulted by 1st Defendant – Whether 2nd Defendant vicariously liable – Generally Indorsed or Specially Indorsed Writ

Damages for personal injuries - Three year limitation – Breach of contract of employment – Six year limitation – Second Defendant pleads sections 9 and 12 of Limitation Act as Defence – Whether 2nd Defendant entitled to 12 months limitation period pursuant to section 12 – Assistant Registrar grouped causes of action and defendants – Separate and distinct treatment of claim warranted

Summons to strike out – Whether Court may strike out at any stage of proceedings – Defence raises limitation periods under Act – Trial of preliminary issue or Striking Out – Frivolous, vexatious and abuse of the court process

Whether Plaintiff can bring a criminal action and civil action at same time in different courts – Plaintiff's action commenced more than three years after alleged assault – Actual knowledge – No power of Court to extend limitation period – Limitation Act, 1995 ss. 5, 9 and 12 – Costs – Wasted costs

The Plaintiff was employed by the 2nd Defendant as a security guard for about 6 years. An assault occurred on 10 March 2012 between her and the 1st Defendant for which the 1st Defendant was convicted in the Magistrate Court on 9 March 2015. The day after, the Plaintiff filed the present action claiming (1) damages for personal injuries and (2) damages for breach of contract of employment.

In their Defence, the Defendants (1) denied that the 1st Defendant unlawfully assaulted the Plaintiff; (2) admitted that the 2nd Defendant is vicariously liable for the actions of the 1st Defendant in that they hired him as one of their employees; (3) admitted that the Plaintiff was dismissed by the 2nd Defendant on or about 19 January 2012 but denied that the dismissal was unlawful and (4) stated that the action is statute-barred as against both Defendants by virtue of sections 9 and 12 of the Limitation Act, 1995.

On 13 May 2015, the Defendants filed a Summons to strike out the Writ of Summons pursuant to O. 18 r. 19 (1) as being frivolous, vexatious and an abuse of the process of the Court.

On 25 July 2017, the Assistant Registrar struck out the entire action on the grounds that it is frivolous, vexatious and an abuse of the process of the court. He appeared to have based that decision on section 12 of the Limitation Act stating that the 2nd Defendant, as a statutory authority is entitled to rely on that section as a Defence.

The Plaintiff, being dissatisfied with the Ruling, has appealed to this Court on seven grounds. .

Held: Finding that (i) the cause of action for personal injuries as a result of an alleged assault by the 1st Defendant is statute-barred against both Defendants and (ii) the cause of action for breach of contract is maintainable only against the 2nd Defendant, the former employer of the Plaintiff

1. The Assistant Registrar cannot be faulted for finding that the Writ of Summons has all of the characteristics of a Specially Indorsed Writ of Summons in that the alleged assault, vicarious liability and unlawful dismissal were all pleaded with sufficient particulars. Accordingly, the first ground of appeal has no merit and must fail.

2. Applying **Alves v Attorney General of the Virgin Islands** [2017] UKPC 42 and **Michael Russell v The Attorney General of The Bahamas et al** SCCivApp No. 83 0f 2016, the 2nd Defendant's public duty under section 12 of the Limitation Act is not engaged by the claim. In the premises, the Assistant Registrar erred in fact and in law by impliedly concluding that the Plaintiff's claim against both Defendants was restricted to a one-year limitation period pursuant to section 12 of the Act. Ground two of the Notice of Appeal is allowed.

3. At paragraph 17 of the Ruling, the Assistant Registrar concluded that the 2nd Defendant is a statutory body and is entitled to rely on section 12 of the Act. He never addressed the autonomy of the 2nd Defendant. Thus, the third ground of appeal is vague and does not arise for consideration.

4. The Assistant Registrar should not have grouped together the two Defendants but treat the case for and against each of them separately. The Assistant Registrar did not expressly conclude that the Plaintiff's cause of action in tort, personal injuries, vicarious liability and breach of contract of employment are all one and statute-barred. However, he was saying just that based on his conclusion. Ground four of the appeal is allowed.

5. Pursuant to section 9 of the Limitation Act, the limitation period for personal injuries claims is three years or the date (if later) of the plaintiff's knowledge. For tort and breach of contract, the limitation period is six years pursuant to section 5 of the said Act.

6. The Writ of Summons raised two causes of action namely assault and breach of contract of employment. On a proper analysis of the facts and the law, the claim for assault, having commenced more than three years after it occurred, is statute-barred against both Defendants.

7. With regards to the claim for breach of contract, the statutory limitation period, being six years, has not expired. Therefore, the Plaintiff may proceed with her claim only against the 2nd Defendant, her former employer. Given the outcome, the Assistant Registrar was partly correct in his ruling but his reasoning was fatally flawed in holding that the 2nd Defendant is entitled to plead section 12 of the Act as a Defence.

8. The Court's power to strike out any pleading or the indorsement of any writ in the action or anything in the pleading is not a novel one. Order 18 Rule 19 empowers the Court to do so at any stage of the proceedings.

9. Where a defendant pleads a defence under the Limitation Act, he can either seek trial of a preliminary issue or in a very clear case, apply to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the court process: **Ronex Properties Ltd v John Laing Construction Ltd** [1893] Q.B. 398, per Donaldson, L.J.

10. Ground 6 of the appeal has no merit. The Court does not have any discretion to enlarge limitation periods which are fixed by statute: **Miriam Lightbourne (Mother & Beneficiary of the Estate of Reginald Johnson v Department of Public Health et al** [2010/CLE/gen/00023] – per Sir Michael Barnett CJ at para. 11.

11. Ground 7 of the Notice of Appeal is untenable. This Court does not find that the Ruling by the Assistant Registrar was so unreasonable that no reasonable tribunal could have arrived at it. The Assistant Registrar found that the action was statute-barred since the 2nd Defendant, a Statutory Authority, is entitled to the protection of section 12 of the Act. This area of law has been a challenge to many judicial officers. See: **Alves v Attorney General of the Virgin Islands** [2017] UKPC 42 and **Michael Russell v The Attorney General of The Bahamas et al** SCCivApp No. 83 0f 2016..

12. The issue of wasted costs, sought by the Defendants who were, by and large, the more successful party in this action, has to be properly ventilated and the legal practitioner has to be given a reasonable opportunity to show cause why such an order should not be made against her.

JUDGMENT

Charles J:

[1] On 25 July 2017, the learned Assistant Registrar, Mr. Edmund Von Turner ("the Assistant Registrar") struck out the Plaintiff's Writ of Summons filed on 10 March 2015 (as amended) for being statute-barred. The Plaintiff, dissatisfied with that Ruling, appeals to this Court seeking a setting aside and/or discharge of the order made by the Assistant Registrar. The Plaintiff also seeks an order for costs pursuant to Order 59 Rules 3(1) and 4 of the Rules of the Supreme Court ("RSC") and the inherent jurisdiction of the Court.

Background facts

[2] On 10 March 2015, the Plaintiff instituted a Writ of Summons against the 1st and 2nd Defendants (collectively "the Defendants") for damages (aggravated and vindicatory), interest and costs. That Writ of Summons has been superseded by an Amended Writ of Summons filed on 21 April 2017 which raises two causes of action. The first cause of action arose from an alleged assault by the 1st Defendant which took place on 3 January 2012, that is, in excess of three years from the date of the filing of the Writ of Summons. The Plaintiff alleged that the 1st Defendant assaulted her and the 2nd Defendant is vicariously liable for his actions. The Plaintiff also alleged that she was unlawfully terminated from her employment with the 2nd Defendant on or about 19 January 2012. This is the second cause of action. She sued for compensatory and vindicatory damages.

[3] The Defendants filed a Defence on 8 April 2015. In a nutshell, the Defendants (1) denied that the 1st Defendant unlawfully assaulted the Plaintiff; (2) admitted that the 2nd Defendant is vicariously liable for the actions of the 1st Defendant in that they hired him as one of their employees; (3) admitted that the Plaintiff was dismissed by the 2nd Defendant on or about 19 January 2012 but denied that the dismissal was unlawful and (4) stated that the action is statute-barred as against both Defendants by virtue of the operation of sections 9 and 12 of the Limitation Act, 1995 ("the Act").

[4] On 13 May 2015, the Defendants filed a Summons to strike out pursuant to O.18 r. 19 of the RSC claiming that the Plaintiff's cause of action is frivolous, vexatious and an abuse of the process of the Court and ought to be struck out.

[5] On 25 July 2017, the Assistant Registrar ruled that the entire action be struck out on the grounds that it is frivolous, vexatious and an abuse of the process of the Court. He appeared to have based that decision on section 12 of the Limitation Act stating that the 2nd Defendant, as a statutory authority, is entitled to rely on section 12 as a Defence. He also awarded costs to the Defendants: see paragraphs 17 and 21 of the Ruling.

[6] The Plaintiff is aggrieved with the Ruling and has appealed to this Court.

The Grounds of Appeal

[7] In her Notice of Motion filed on 31 July 2017, the Plaintiff raised seven grounds of appeal. Each ground will be considered in a sequential manner.

Ground 1 - Specially or Generally Indorsed Writ of Summons?

[8] Ground 1 alleged that the Assistant Registrar erred in fact and in law when he wrongly concluded that the Plaintiff's Writ of Summons filed on 10 March 2015 was a Specially Indorsed Writ of Summons.

[9] Learned Counsel for the Plaintiff, Mrs. Farquharson-Seymour submitted that the Writ of Summons is a Generally Indorsed and not a Specially Indorsed Writ of Summons. She contended that it is a Generally Indorsed Writ of Summons because the Statement of Claim would certainly have to be more detailed to provide for particulars of the tort, particulars of the injuries suffered and particulars of damage.

[10] At paragraphs 9 and 10 of his Ruling, the Assistant Registrar addressed the issue in this manner. He said:

> **"9. In perusing the 'Indorsement' in the said document, it is seen that there is a fourteen (14) paragraph pleading that Counsel for the**

Plaintiff argues lacks sufficient particularity. However, on the face of it, the same has characteristics, i.e. particular detail to warrant the same being a Specially Indorsed Writ of Summons. It is seen in the 'White Book' at 6/2/3 that, i.e.:

> **'There are no longer any prescribed forms of Statement of Claim….This makes it all the more necessary for the indorsement on the writ to be a full and proper statement of claim, with proper particulars to be given. There is, however, a practice which allows a statement of claim, provided it does not properly plead a cause of action, to be in a somewhat attenuated form.'**

10. Considering the above, and the fact that the allegation of assault, vicarious liability and unlawful dismissal were all pleaded with sufficient particularity, the writ of summons filed on 10th March 2015, can be considered specially indorsed writ. Please note that leave was granted to amend the Writ of Summons filed on 10th March 2015 regarding the issue of tort."

[11] Learned Counsel Mr. Turnquest who appeared for the Defendants contended that, firstly, it matters not whether the writ was generally or specially indorsed. By O.18, r.19 the Court may at any stage 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."* Put another way, even if the writ is understood to be generally indorsed, O.18, r.19 gives the Court precisely the same power to strike a general indorsement as it does with a special indorsement (statement of claim).

[12] Secondly, and as the Ruling exemplifies, the writ: contained (i) a 14-paragraph account which had the level of detail expected of a statement of claim; and (ii) the writ in any event specifically directed the Defendants to deliver a Defence to the Plaintiff's attorney after filing an appearance. A Defence was obviously called for after a statement of claim was served.

[13] The Assistant Registrar found that the Writ of Summons with the word 'Indorsement' is a Specially Indorsed Writ of Summons. I agree with the Assistant Registrar for reasons which he expressed in the Ruling and elaborated upon by learned Counsel Mr. Turnquest. Furthermore, a plaintiff who approaches the court must come properly and ought not to unnecessarily burden the court with

too many amendments, many of which could have been achieved when the Writ of Summons was commenced. As the learned authors of **The Supreme Court Practice 1999 at 6/2/3** state: "*There are no longer any prescribed forms of Statement of Claim….This makes it all the more necessary for the indorsement of the writ to be a full and proper statement of claim, with proper particulars to be given*."

[14] In addition, I agree with learned Counsel Mr. Turnquest, that O. 18 r. 19 gives the Court identical discretionary power to strike out a general indorsement as it does with a special indorsement of a Statement of Claim.

[15] In passing, I observed that the Assistant Registrar had given leave to the Plaintiff to amend the Writ of Summons which was filed on 10 March 2015 but it does not alter the position of whether or not the Writ of Summons is generally or specially indorsed.

[16] Simply put, ground 1 of the Notice of Appeal has no merit and must fail.

Ground 2 – One year limitation period to bring action

[17] The Plaintiff argued, at ground 2 of her Notice of Appeal, that the Assistant Registrar erred in fact and in law by wrongly interpreting that the Plaintiff's claim against both Defendants was restricted to a one-year limitation period pursuant to section 12 of the Act.

[18] At paragraph 15 of the Ruling, the Assistant Registrar quoted, in its entirety, section 12 of the Act which provides:

> **"(1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the provisions of subsection (2) shall have effect.**
>
> **(2) <u>The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act</u>, neglect or default complained of …."**[Emphasis added]

[19] And at paragraph 17, he concluded as follows:

> **"As a result, section 12 of the Act is applicable, particularly, considering the characteristic of the 2nd Defendant. The Second Defendant, as a Statutory Authority is entitled to make use of section 12 as a Defence, and as a result, the Plaintiff in law had one year from (sic) the cause of action arose, to file a writ of summons. <u>As a result, the Plaintiff's cause of action in tort and vicarious liability are statute barred</u>."**[Emphasis added]

[20] Learned Counsel Mr. Turnquest was terse in his submissions. He contended that it is unclear whether the Assistant Registrar intended to rule that the one year limitation period applied to both Defendants but whether he did or not is irrelevant to the case since the Defendants rely on section 9 of the Act.

[21] Scrutinizing the Ruling, the Assistant Registrar did not expressly conclude that the Plaintiff's claim against **both** Defendants was restricted to the one year limitation period. Nonetheless, it is not fanciful to conclude that the Assistant Registrar meant just that when he dismissed the entire claim against both Defendants. He found, at paragraph 17, that the Plaintiff's cause of action in tort and vicarious liability are statute-barred by the operation of section 12 of the Act.

[22] In my opinion, the Assistant Registrar was wrong to even consider section 12. The Plaintiff sued the Defendants for an assault which the 1st Defendant allegedly committed on her. The 1st Defendant is a private person so he cannot seek the protection of section 12. The fact that he is employed by the 2nd Defendant, a statutory authority, is irrelevant. The 2nd Defendant admitted that it is vicariously liable for the acts of the 1st Defendant because it is the employer. It cannot benefit from the limitation period under section 12 because it was not performing any public duty. For the second cause of action for breach of contract of employment, this claim could only be brought against the 2nd Defendant who was the Plaintiff's employer. Again, the 2nd Defendant's public duty is not engaged by an alleged breach of contract of its employee.

[23] A similar issue arose in **Daphne Alves v The Attorney General of the Virgin Islands** Claim No. BVIHCV2007/0306 [unreported]. Ms. Alves was employed by the Government of the Virgin Islands as a nurse. She was assigned to Peebles Hospital when she was injured. On 17 December 2007, she sued the Attorney General of the Virgin Islands (in his capacity as legal representative of the Crown under the Crown Proceedings Act, Cap. 21) for damages as a result of the injuries which she suffered. The material pleadings were that she was an employee of the Government; she was injured during the course of her employment and, as her employer, the Government owed her a duty to take reasonable care for her safety.

[24] In his Defence, the Attorney General pleaded that Ms. Alves' claim, which was filed more than six months after the incident occurred, was barred as a result of section 2 of the Public Authorities Protection Act ("PAPA").

[25] As the trial judge, I held that *"the Government's public duty under the Public Hospital Act is not engaged by the claim…. The act of neglect or omission of duty alleged by the claimant is of a private, rather than a public character. She acted under a private contract of employment and the duty of care was owed to her personally and not to all the public alike*."

[26] Consequently, I found that the claim was not statute-barred and the Government was not entitled to the six month limitation period pursuant to the Protection of the Public Authorities Protection Act ("PAPA").

[27] The Court of Appeal allowed the appeal.

[28] On further appeal to the Privy Council (**Alves v Attorney General of the Virgin Islands)** [2017] UKPC 42), the Board allowed the appeal and restored my decision. Lord Hughes had this to say at paragraph 37:

> **"Despite the potentially wide words of PAPA, it must, as has consistently been held, be construed restrictively. It only applies to public authorities, and not to all persons acting under statutory authority. It does not apply to**

> **all actions performed by public authorities, but only to those where the obligation sued upon is owed generally to the public or to a section of it. Where the obligation sued upon arises out of a relationship with the claimant which would be the same for any non-public person or body, and where there is no question of a public law challenge, the Act has no application. <u>The duty of care which the government is admitted to have owed to Mrs. Alves qua employer was accordingly a private obligation exactly the same as is owed by any employer, and not a public obligation for the purposes of PAPA. The six month limitation period did not apply.</u>"** [Emphasis added].

[29] Not so long ago, in **Michael Russell v The Attorney General of The Bahamas et al** SCCCivApp No. 83 of 2016, Barnett JA (Actg) applied **Alves**. He allowed the appeal and remitted the matter to the Supreme Court for a full trial. Quoting extensively from **Alves**, Barnett JA (Actg) held at paragraph 17 of the judgment that:

> **"*Alves* suggests that the limitation of 12 months may not apply to a breach of an individual duty owed by a public authority to an individual person as opposed to the public generally. Ex facie, it is unclear why the duty owed by a police officer not to assault another person should be any different that [sic] the duty owed by a non-police officer not to assault another person and thus have the benefit of a shorter limitation period."**

[30] Based on the foregoing legal principles, I find that the Assistant Registrar erred in fact and in law by impliedly concluding that the Plaintiff's claim against both Defendants was restricted to a one-year limitation period pursuant to section 12 of the Act. In my opinion, neither defendant can rely on the one-year limitation period.

Ground 3 – Did the Assistant Registrar find that the 2nd Defendant is a statutory body without autonomy?

[31] In the third ground of appeal, the Plaintiff alleged that the Assistant Registrar erred in fact and in law when he concluded that the 2nd Defendant was a statutory body without autonomy.

[32] Learned Counsel Mrs. Farquharson-Seymour submitted that, on 5 April 2017, the Registrar ruled that the 3rd Defendant (the Attorney General) was not a proper party to this action and struck out the Attorney General. Subsequently, on 17

May 2017, the Plaintiff filed an Amended Writ of Summons removing the Attorney General as the 3rd Defendant from these proceedings. She argued that, having struck out the Attorney General as a party on the ground that the 2nd Defendant (Airport Authority) was autonomous, he went on to find that the limitation period of one year applied to the present action.

[33] At paragraph 17 of the Ruling, the Assistant Registrar concluded that the 2nd Defendant is a statutory body and is entitled to rely on section 12 of the Act. He never addressed the autonomy of the 2nd Defendant. I agree with learned Counsel Mr. Turnquest that the rationale for this ground is vague.

Ground 4 – Are the claims against the 1st Defendant separate and distinct from claims against the 2nd Defendant

[34] Learned Counsel Mrs. Farquharson-Seymour argued that the Assistant Registrar erred in fact and in law when he failed to consider the claim(s) against the 1st Defendant as separate and distinct from the claim(s) as against the 2nd Defendant.

[35] It is alleged that, on 3 January 2012, the 1st Defendant assaulted the Plaintiff whilst at work. The 1st Defendant grabbed the Plaintiff's identification badge and viciously struck her on the chest. He was convicted of assault on 9 March 2015. Learned Counsel Mrs. Farquharson-Seymour submitted that the 1st Defendant is a private individual and he is sued in his own right. He has no special immunity. His actions are subject to the six-year limitation period prescribed by section 5(1)(a) of the Act and not the three-year period for personal injuries prescribed by section 9 of the said Act.

[36] The Plaintiff next submitted that section 9 relates to "*actions for damages for negligence, nuisance or breach of duty*" none of which, she contended, covers assaults or other cases of intentional trespass to the person. Therefore, assaults fall within the category of general torts to which the six-year limitation period applies.

[37] Learned Counsel Mr. Turnquest contended that it is irrelevant whether or not the Assistant Registrar treated the claims against the Defendants as the same. According to him, it has always been the Defendants' contention that the limitation period against the 1st Defendant was three years, not one. This does not appear to be an accurate assertion by the Defendants. In their Defence, they pleaded section 12 of the Act.

[38] Aside from that, Mr. Turnquest succinctly submitted that since the action was commenced more than three years after the cause of action accrued, the action (for assault) was, by the time it was commenced, equally as statute-barred against the 1st Defendant as it was against the 2nd, whether or not the one-year limitation period would also apply to proceedings against the 2nd Defendant.

The law

Periods of limitation for different classes of action

[39] Section 5 (1) (a) of the Act provides that actions founded on simple contract (including quasi contract) or a tort shall not be brought after the expiry of six years from the date on which the cause of action accrued.

[40] Section 9 deals with the time limit for personal injuries. Section 9(1) states:

> **"…[T]his section shall apply to any action for damages for negligence, nuisance or breach of duty …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."** [Emphasis added]

[41] Subsection 2 provides that 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.

Analysis and Findings

[42] The Amended Writ of Summons, though somewhat deficient in particulars, raises two causes of action: (1) assault and (2) breach of contract of employment.

[43] At paragraphs 3 to 6, the Plaintiff asserted that she was unlawfully assaulted by the 1st Defendant. At paragraph 7, she alleged that the actions of the 1st Defendant of physically hitting and threatening her is believed to be an assault and tortious. At paragraph 9, she alleged that the 2nd Defendant, their employees and/or agents were negligent and/or in breach of their statutory duty and common law duties owed to the Plaintiff. At paragraph 13, the Plaintiff alleged that due to the said assault, tort, negligence and breaches of statutory and common law duties owed to her, she has suffered much loss and personal injuries. She claims compensatory and vindicatory damages. This is the first cause of action. A dispute has arisen as to whether it is a claim in tort or for personal injuries.

[44] At paragraph 8, the Plaintiff alleged that she was unlawfully terminated by the 2nd Defendant. At paragraph 11, she seeks compensatory and vindicatory damages against the Defendants for her wrongful termination on or about 19 January 2012. At paragraph 12, she alleged that she was unfairly dismissed after six years of dedicated service. This is another cause of action for breach of contract of employment.

[45] It cannot be disputed that the limitation period for personal injuries claims is three years or the date (if later) of the plaintiff's knowledge. For tort and breach of contract, the statutory period of limitation is six years.

[46] It is plain from the preceding paragraphs that the Plaintiff's first cause of action is for personal injuries as a result of an assault, being a trespass to the person. It is not a case of tort. Support for this is to be found at paragraph 13 where the Plaintiff alleged that "*due to the said assault, tort, negligence and breaches of statutory and common law duties owed to the Plaintiff, she has suffered much loss and personal injuries*."

[47] Simply seeking an amendment to add the word "tort" does not make the assault a tort. The essential ingredients of a tort are (i) existence of a legal duty owed by

to the Plaintiff; (ii) breach of that duty and (iii) a casual relation between the 1st Defendant's conduct and the resulting damage to the Plaintiff. In this case, the 1st Defendant does not owe the Plaintiff any legal duty of care. I therefore cannot accept the arguments postulated by Mrs. Farquharson-Seymour that the assault falls within the category of general torts to which the six-year limitation period applies.

[48] Learned Counsel Mr. Turnquest cited a plethora of authorities to fortify his argument that the Plaintiff's first cause of action for assault is founded on a claim of personal injuries to which the limitation period of three years applies.

[49] In **First Caribbean Finance Corporation (Bahamas) Limited v Higgs and another** [2008] BHS J. No. 50, Evans J (as he then was), at paragraph 57 of the judgment, said:

> **"Further, by section 9 of the 1995 Act (Limitation Act) the limitation period for personal injuries actions was abridged from six (6) to three (3) years and Parliament expressly preserved the longer limitation period which was in place prior to the 1995 Act. So that in cases where the cause of action for damages for personal injury had accrued prior to the commencement of the 1995 Act, the time for bringing such an action continued to be 6 years from the date on which the cause of action accrued, even though the period had been reduced to three (3) years."**

[50] In **Long v Hepworth** [1968] 3 AER 248, a case of intentional assault, the infant plaintiff received eye injuries on 26 August 1960 when she was struck in the face by a handful of cement which she alleged had been intentionally thrown at her by the defendant. By writ issued on 25 August 1966, the plaintiff (suing by her next friend) claimed damages for injuries caused to her by trespass to her person. On the preliminary issue of whether the claim was statute-barred by the Limitation Act, 1939 [Eng.], it was held to be statute-barred because the expression "breach of duty" was sufficiently wide to cover intentional trespass and therefore a limitation period of three years applied.

[51] This remained the position until the much-criticized decision of the House of Lords in **Stubbings v Webb** [1993] AC 498 which, for the first time, held that an

action for damages for personal injuries for intentional trespass to the person fell outside the statutory definition of actions for personal injuries based on breach of duty.

[52] Fifteen years later, in the celebrated case of **A v Hoare** [2008] UKHL 6, the House of Lords was invited to depart from its previous decision in **Stubbings**. Although a rarity to depart from its own decision, the House of Lords unanimously reversed itself and held that its decision in **Stubbings** was wrong, allowing the appeals in six cases and adopting (at paragraph 8 of the Judgment) Lord Greene MR's opinion in **Billings v Reed** [1945] KB 11 where he stated:

> **"It seems to me that in this context the phrase 'breach of duty' is comprehensive enough to cover the case of trespass to the person which is certainly a breach of duty as used in a wide sense."**

[53] Lord Brown of Eaton-Under-Heywood in **A v Hoare** expressed **(**at paragraph 80 of the Judgment) his agreement with Lord Hoffman, stating (referring to the analysis he had presented shortly before at paragraph 75):

> **"…[W]hen the statutory definition was first introduced with Phase Two in 1954 it clearly *was* arguable that Parliament could not have been intending to shorten the limitation period governing claims for damages for intentional assault (even though the period was being shortened for personal injury claims generally). When Phase three was introduced, however, this was intended to benefit (in the two respects already identified) those claiming damages for personal injuries and Parliament surely cannot have intended to exclude from such benefits (to the advantage of their assailants) those intentionally injured. Rather Parliament must have had in mind the *Letang v Cooper* line of authority (hitherto disadvantageous to such claimants) and intended them to benefit along with all the others claiming damages for personal injuries."**

[54] The House of Lords held that "breach of duty" in section 11 of the Limitation Act, 1980 [UK] which mirrors section 9 of the Limitation Act [Bah.], has a broad meaning and extends to cases of deliberate assault. In other words, the three-year limitation period applies to all claims for damages for personal injuries. To date, this law has remained unchallenged.

[55] Based on the foregoing, I find that since the action for assault was commenced more than three years after the cause of action accrued, that cause of action was, by the time it was commenced, equally as statute-barred against the 1st Defendant as it was against the 2nd Defendant.

Ground 5

[56] The Plaintiff alleged, at ground 5, that the Assistant Registrar erred in fact and in law when he concluded that the Plaintiff's causes of actions in tort, personal injury, vicarious liability and breach of contract of employment were all one and statute-barred.

[57] I do not entirely agree with the Defendants that nowhere in the Ruling did the Assistant Registrar conclude that the Plaintiff's causes of action in tort, personal injury, vicarious liability and breach of contract of employment are all one. He may not have used that precise language but having concluded that the Plaintiff's cause of action in tort and vicarious liability are statute-barred since the 2nd Defendant is entitled to make use of section 12 as a Defence, he essentially was saying just that.

[58] On the authorities of **Alves** and **Russell** [supra], the Assistant Registrar was clearly wrong to conclude that the 2nd Defendant is entitled to make use of section 12 as a Defence and since the Plaintiff did not file the present action within one year her cause of action is statute-barred.

Court's power to strike out

[59] O 18 r. 19 (1) of the RSC states:

> **"The Court may <u>at any stage of the proceedings</u> 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."

[60] As a general rule, the Court has the power to strike out a party's case at any stage of the proceedings. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be exercised only in exceptional cases.

[61] In **Walsh v Misseldine** [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the Court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The Court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.

[62] It is also part of the Court's active case management role to ascertain the issues at an early stage.

[63] The Court, when exercising the power to strike out, will have regard to the overriding objective of O. 31A of the RSC and to its general powers of management. It has the power to strike out only part of the statement of claim or direct that a party shall have permission to amend. Such an approach is expressly contemplated in the RSC: see O 18 r. 19.

[64] The law is that where a defendant pleads a defence under the Limitation Act he can either seek trial of a preliminary issue or in a very clear case, apply to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the Court: **Ronex Properties Ltd v John Laing Construction Ltd** [1893] Q.B. 398, per Donaldson, L.J.

[65] The learned authors of **The Supreme Court Practice 1999** stated at 18/19/11:

> **"Where it appeared from the statement of claim that the cause of action arose outside the statutory period of limitation, it was held that the statement of claim would not be struck out unless the case was one to which the Real Property Limitation Acts applied (see *Price v Phillips [1894] W.N. 213).* However, if the defendant does plead a defence under the Limitation Act, he can seek the trial of a preliminary issue, or 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 (see, *per* Donaldson L.J. in *Ronex Properties Ltd v John Laing Construction Ltd* [1983] Q.B. 398). Thus, where the statement of claim discloses 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 Act 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 (*Riches v Director of Public Prosecutions* [1973] W.L.R. 1019; [1973] 2 All ER 935, CA, as explained in *Ronex Properties Ltd v John Laing Construction Ltd,* above)."**

Analysis and Findings

[66] In their Defence, the Defendants pleaded that the present action is statute-barred by virtue of sections 9 and 12 of the Act. The Plaintiff did not file a Reply. On 13 May 2015, the Defendants issued a Summons to strike out the Writ of Summons pursuant to O. 18 r. 19 as being frivolous, vexatious and an abuse of the process of the Court.

[67] There is no dispute that the alleged assault against the Plaintiff by the 1st Defendant took place on 3 January 2012 at about 10:10 in the morning; three years thenceforth is 3 January 2015.

[68] It is beyond question that the Plaintiff's claim includes damages in respect of personal injuries to herself and that the claim comprises an assertion against the 2nd Defendant for breach of statutory duty.

[69] By section 9(1) of the Act, where an action for damages or negligence, nuisance or breach of duty in which the damages claimed by the plaintiff "consist of or include damages in respect of personal injuries to the plaintiff or any persons,"

the action cannot be commenced after the expiry of three years from the date on which the cause of action accrued which, in the present case, is 3 January 2012.

[70] Learned Counsel Mrs. Farquharson-Seymour argued that the Assistant Registrar failed to consider the case for and against each defendant separately. I believe so judging from his conclusion in applying the 12-month limitation period in respect of both Defendants.

[71] Since the case against the 1st Defendant can only be for assault and it is statute-barred, it logically follows that the case against the 2nd Defendant is also statute-barred. Put another way, if the 1st Defendant cannot be sued, the 2nd Defendant cannot be vicariously liable for his actions.

[72] Now, for the claim of wrongful termination of her contract of employment, it cannot be disputed that the limitation period is six years. It cannot be gainsaid that the Plaintiff could only proceed against the 2nd Defendant since the 1st Defendant was not her employer. It seems to me that the Specially Indorsed Writ of Summons will have to undergo extensive facelift to remove all pleadings relating to the 1st Defendant. Unquestionably, that will be a very painful and untidy exercise.

[73] That being said, it seems to me that the Assistant Registrar was wrong to strike out the entire cause of action (assault and breach of contract of employment) against both Defendants. There is still a live cause of action against the 2nd Defendant for breach of contract of employment. Whether or not it will survive in this Court is left to be seen. As I indicated a moment ago, massive reconstructive surgery will have to be done to the Plaintiff's pleadings which may warrant a withdrawal of this aspect of the claim and the filing of a new claim, which I understood, has already taken place. If that is so, it seems to me that the prudent approach of the Plaintiff may be to withdraw the present cause of action for breach of contract against the 2nd Defendant since there cannot be two identical actions.

Ground 6

[74] In ground 6, the Plaintiff alleged that the Assistant Registrar erred in fact and in law, when he failed to address his mind to the reason(s) given by the Plaintiff for the delay and the legal authorities presented that establish the precedent of a cause of action not commencing until there is "actual knowledge" of the alleged breach.

[75] Learned Counsel Mrs. Farquharson-Seymour submitted that knowledge arose on 9 March 2015, the date when the 1st Defendant was convicted for assault in the Magistrate Court. This is an extraordinary exposition of the law.

[76] Learned Counsel Mrs. Farquharson-Seymour further submitted that it would have been an abuse of the process of the Court to file two actions (criminal and civil) at the same time in different courts. She relied on the Court of Appeal case of **Bahamas Commercial Stores Supermarket & Warehouse Workers Union v Caribbean Bottling Company (Bahamas) Ltd** [1996] BHS J. No. 36 and more specifically, paragraphs 17 and 18. Regrettably, neither paragraph support Mrs. Farquharson-Seymour's submission. On the contrary, the case is authority for the proposition that it is vexatious for two proceedings involving the **same basic issue** to be litigated before different courts. So, a criminal action for assault filed in the Magistrate Court is a far cry from a civil claim for personal injuries and breach of contract of employment in the Supreme Court.

[77] Learned Counsel Mr. Turnquest dubbed this attempt by the Plaintiff as something of a 'hail Mary." He next submitted that section 9 does not refer to a plaintiff's "actual" knowledge", only a plaintiff's knowledge and section 10 specifies what constitutes knowledge.

[78] He next argued that the Plaintiff has never sought to bring herself within the parameters set out in section 10, preferring, instead, to contend that she was unaware that she had a civil cause of action until the 1st Defendant was convicted of assault, which does not bring her within the parameters of section 10: beyond

the fact that knowledge of a conviction for an alleged tortious act is not what is meant by knowledge for the purposes of section 9. The Plaintiff has yet to explain how it is that she was sufficiently aware that an actionable assault had occurred to be prompted to make a criminal complaint but not sufficiently aware that the same assault had occurred to enable her to initiate a civil proceeding.

[79] The submission that the Plaintiff's knowledge arose on 9 March 2015, the date of the 1st Defendant's conviction for assault in the Magistrate Court is wholly misconceived.

[80] Mr. Turnquest next submitted that undergirding the proposition that the Assistant Registrar failed to direct his mind to the reasons given by the Plaintiff for the delay is presumably the Plaintiff's contention that the Court has a discretion to extend the statutory filing deadline. In fact, **Horton v. Sadler** is an English decision dealing with section 33 of the Limitation Act, 1980 [Eng.] which expressly gives the English Court, discretion to extend. There is no equivalent provision in the Bahamian legislation. In **Miriam Lightbourne (Mother & Beneficiary of the Estate of Reginald Johnson v Department of Public Health et al** [2010/CLE/gen/00023], Sir Michael Barnett, C.J. at paragraph 11 of the judgment said:

> **"I repeat what I said in *Neilly v Federal Management Systems (Bahamas) Ltd* No. 223 of 2009.**
>
> > **"There is no power in the Court to extend the limitation period specified in section 9 of the Limitation Act of The Bahamas. Although The Bahamas statute is patterned on the English 1980 Limitation Act, the Parliament of The Bahamas did not include a section equivalent to section 33 of the English statute."**

[81] At paragraph 14 of the Judgment, his Lordship continued:

> **"If this Court had the same powers as an English court would have had, I would have had no hesitation to allowing this action to continue. Alas, I have no such power and with much regret, I must strike out the action on the ground that it is barred by the provisions of the Limitation Act."**

[82] I agree with learned Counsel Mr. Turnquest that the Plaintiff's appeal to what is "equitable" is also misconceived.

[83] For this reason, the concern expressed by the Plaintiff that it would have been "unreasonable and an abuse" for her to have commenced two different actions in two different courts at the same time, quite apart from reflecting a fundamental misapprehension of the law, could not in any event operate to empower the Court to extend the three-year statutory limitation period.

Ground 7

[84] At ground 7, the Plaintiff submitted that the Assistant Registrar's ruling was so unreasonable that no reasonable tribunal or authority entrusted with his power could have reasonably or lawfully come to that conclusion.

[85] Simply put, I cannot fault the Assistant Registrar for coming to the conclusion that he arrived at. The law with respect to section 12 of the Act and its application to public bodies has always been a complex area of law. For many years it has posed challenges to judicial officers. However, I believe that the cases of **Alves** and **Russell** have paved a simpler way going forward.

[86] In the premises, the appeal against the Ruling of the Assistant Registrar in striking out the claim in its entirety save for the Plaintiff's claim for breach of contract of employment against the 2nd Defendant is dismissed with costs.

Wasted costs or not?

[87] The issue of costs remains a vexed one. It is no different in this case where, by and large, the Defendants are the successful parties. The Defendants have helpfully provided a bundle on costs and have identified numerous reasons as to why a wasted costs order ought to be made against the Plaintiff's Counsel personally: see paragraphs 1- 14 of the Defendants' submissions on costs.

[88] "Wasted costs" means any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission by a legal practitioner. When an order

for wasted costs is to be made, the Court must give to the legal practitioner, a reasonable opportunity to show cause why such an order should not be made.

[89] In the circumstances, I will invite learned Counsel Mrs. Farquharson-Seymour to email written submissions to me by 15 December 2018. If the need arises, I will also hear oral arguments from the parties.

[90] Last but not least, I sincerely apologize for the inordinate delay in the delivery of this long-awaited judgment.

Dated this 14th day of November, A.D, 2018

Indra H. Charles
Justice