COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2017/CLE/gen/01130

B E T W E E N

DALE TURNQUEST

Plaintiff

AND

THE ATTORNEY-GENERAL

Defendant

Before Hon. Justice Simone I Fitzcharles (Acting)

Appearance: I A Nicholas Mitchell for the Plaintiff

Luana Ingraham for the Defendant

14 September 2022

RULING

FITZCHARLES, J (Acting)

1. In the broader context of an action brought under the Fatal Accidents Act and the Survival of Action Act, the defendant, by its Summons filed on 31 August 2022, seeks to apply for the following relief:

   (1) leave, pursuant to Order 20 rule 5 of the Rules of the Supreme Court (RSC) and under the inherent jurisdiction of the Court, to amend its Defence filed on 1 December 2017 (the 'Defence'), or alternatively

   (2) to strike out the plaintiff's Writ of Summons filed on 25 September 2022 (the 'Writ') pursuant to Order 18 rule 19 of the RSC.

2. By way of background, a collision occurred on 1 October 2016 between a vessel operated by members of the Royal Bahamas Defence Force ('RBDF'), Able Seaman Claude Lesbott and/or Marine Seaman Kendrick Edgecombe ('the RBDF Members'), and another vessel piloted by Christopher Turnquest and/or his cousin, Keno Turnquest, in the waters opposite the Bay Street Marina in the District of Nassau, New Providence. As a result of the collision Christopher Turnquest was killed at the age of twenty-five.

3. By the Writ, the plaintiff, Dale Turnquest, mother of the deceased, brought an action against the Attorney-General on the basis that by Section 12 of the Crown Proceedings Act, the Crown is vicariously liable for the actions of the RBDF Members. The Plaintiff alleges that the collision, injuries and death of Christopher Turnquest were caused by the negligence of the RBDF Members. Mrs Turnquest commenced the action in the capacity of "Mother and Person Entitled of Christopher Turnquest, deceased, for the benefit of all Persons Entitled" and as "Intended Administratrix". The Court understands that such other Persons Entitled (echoing the language of Section 4(2)(b) of the Fatal Accidents Act) are the children of the deceased.

4. On 23 October 2017, the Plaintiff received a grant of Letters of Administration in the Estate of Christopher Turnquest. As such, prior to serving the Writ on the defendant, pursuant to Order 20 rule 1 the Plaintiff amended the Writ and altered the capacity in which she sued to "Administratrix of the Estate of Christopher Turnquest, deceased, for the benefit of any or all Persons Entitled". She filed her Amended Writ on 2 November 2017 and served the same. In response, the

defendant entered its Memorandum of Appearance on 30 November 2017 and subsequently, the Defence.

Application to Amend

5. To amend the Defence, the defendant relies upon Order 20 rule 5 which in part provides:

"5(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

"(2) Where an application to the Court for leave to make the amendment mentioned in (3), (4) or (5) is made after any relevant period of limitation current at the date of the issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
(3)...
(4)...

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to amend."

6. The Court considers also Order 20 rule 7(1) which states:

"7(1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

7. The defendant's application to amend is supported by the Affidavit of Nevado Fraser filed on 31 August 2022. The Affidavit exhibits a draft amended defence by which the defendant in the main wishes to plead inter alia:

(1) that the plaintiff's action was premature and no cause of action is maintainable against the defendant under the Survival of Action Act, 1992, because the plaintiff commenced her action without having first acquired the grant of letters of administration;

(2) that no action shall lie against any member of the RBDF in respect of anything done by him while in the execution of his duty provided that such member acted bona fide in the execution of his duty; and

(3) particulars of contributory negligence. The defendant averred at paragraph 6(h) of its Defence that the plaintiff contributed to the injuries he sustained, but no particulars of contributory negligence were set out and named as such in the original version.

8. The issue for the Court is whether the amendments ought to be permitted. There has been a delay in bringing the sought-after amendments to the fore. The grounds of defence, respectively rooted in the lack of capacity of the plaintiff to have brought the cause pursuant to the Survival of Action Act, and in immunity of the RBDF Members on the basis of bona fides in executing their duty pursuant to Section 210 of the Defence Act, both accrued to the defendant from the outset of this action. As such, the defendant could have pleaded these grounds in the Defence in 2017. The Court observes the history of the Defence. It was filed on 1 December 2017. Further, by its Summons filed on 13 July 2020, the defendant sought leave to amend the Defence. As a consequence of obtaining such leave the defendant filed its Amended Defence on 2 September 2020. The defendant did not seize that opportunity to amend to add the grounds of defence it now seeks to include.

9. Counsel for the defendant submits that the amendments for which leave is sought are necessary in order to clarify and determine the real controversy between the parties. Mr Fraser expresses the belief in his supporting Affidavit that the Defence, bolstered by the amendments proposed, has a real prospect of success. It is contended that without the amendments the Crown will not have a fair trial and will be prejudiced in not being able to rely upon the grounds of defence which accrued to it. Moreover, the defendant states that the proposed amendments, brought now in good faith, do not add new evidence or change the case against the Crown. Relying on **Delta Prperties Limited and Bahamas Electricity Corporation**, BHS 2010 SC 110, a Bahamian Supreme Court decision, the Crown referred to the decision of Millet LJ in **Gale v Superdrug Stores Plc** [1996] 1 WLR 1089 which was cited with approval in the Bahamian

case. In particular, the Court takes note of the following passage from the speech of Millet LJ:

"It is not normally necessary for a party to justify his decision to amend his pleadings or withdraw an admission. It is enough that he wishes to do so...Of course, the unexpected nature of the defence must have been a disappointment to the plaintiff; but I cannot think that this should count for anything. The sounder the defence sought to be raised by amendment, the greater the disappointment to the plaintiff if it is allowed and the greater the injustice to the defendant if it is not. What the court must strive to avoid is injustice, not disappointment."

10. In relation to the timing of the amendments, the defendant referred to the decision of **Clarapede & Co v Commercial Union Association** (1883) 32 WR 262 at page 263 in which Brett MR stated:

"However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs...".

11. The plaintiff argues that leave to amend the defence ought to be denied on the basis that the amendments, save for the portions which pertain to contributory negligence:

(1) provide no further clarification of the issues; and

(2) are inflammatory and misleading.

12. The latter ground upon which the plaintiff seeks the Court's refusal of the proposed amendments may be dealt with summarily. It was common amongst the parties that while Keno Turnquest was seen by the RBDF Members who were involved in the fatal collision immediately after the crash, the body of Christopher Turnquest was not seen by the authorities until some days later. The plaintiff's Counsel therefore took grave exception to the proposed amendment at paragraph 6(g) in the draft exhibited to Mr Fraser's Affidavit in that Counsel contended it suggested that both the deceased and his cousin were recovered immediately after the accident. Counsel therefore alleged that the defendant sought to change common facts and in doing so, to mislead.

13. Counsel for the defendant quickly dealt with the issue, and clarified with an apology that the draft pleading as to the recovery of both men immediately after the accident in the proposed paragraph 6(g) was an error which would be corrected if leave were granted.

14. The plaintiff submits that the issues are already before the Court and that the amendments add nothing of substance. The Court does not agree.

15. Section 210 of the Defence Act affords members of the RBDF protection from legal action as it provides:

> "No action shall be brought against any member of the Defence Force in respect of anything done by him while in the execution of his duty as such, provided that such member acted bona fide in the execution of his duty."

16. The defendant in its draft Amended Defence (which ought to be a draft Re-Amended Defence because the Crown file an Amended Defence on 2 September 2020) seeks to aver as follows:

> "...[T]hat no action shall lie against any member of the Defence force in respect of anything done by him while in the execution of his duty as such, provided that such member acted bona fide in the execution of his duty. The Defendant will further assert that the finding of the jury in the Coroner's inquest was that the death of the deceased Christopher Turnquest was accidental."

17. The Court is of the view that this draft averment, which echoes the wording of Section 210 of the Defence Act, does not raise a hopeless or frivolous defence. I accept, as asserted for the plaintiff, that the burden is upon the defendant to satisfy the Court in evidence at trial that the RBDF Members involved in the collision fall within the protection of the proviso as stated in the proposed averment and in Section 210 of the Defence Act. However, if the same is so proven, the result could be dispositive of the entire case for in that event such liability as is currently alleged by the plaintiff will not rest upon the RBDF Members, or indeed, the Crown.

18. In **Clemenza Ltd and another v Attorney-General of The Bahamas and another** 2017/CLE/gen/00866, Section 210 formed the basis upon which Her Ladyship Justice Bowe-Darville found that, upon hearing the evidence and considering the circumstances of the case, the RBDF was protected by immunity

from a claim in negligence, having satisfied the Court that its members acted bona fide in the performance of their duties.

19. Another part of the draft amendment raises a defence to the effect that the plaintiff cannot maintain her action under the Survival of Action Act. The draft provides:

"The Defendant will say that at the time of commencing an action against the Defendant the Plaintiff should have taken out representation and acquired Letters of Administration to institute an action against the Defendant. The Plaintiff first made application as an "Intended Administrator" and later amended her Writ of Summons to make application in the capacity as Administratrix of the deceased's estate, one (1) year after the deceased's death. The Plaintiff's action was premature and therefore no proceedings shall be maintainable against the Defendant under the Survival of Action Act, 1992."

20. The Court is of the view that these averments in relation to the defect in the Writ as it pertains to the Survival of Action Act are arguable. Even if there are viable arguments in opposition to the point, the defendant's position is not ill-founded as is sought to be argued by the plaintiff.

21. The plaintiff appears to raise no particular objection to the draft particulars of contributory negligence or other parts of the draft by which apparently clerical adjustments are made.

22. The Court must look at all factors in the round and come to a decision which creates injustice to no party. The trial has not yet commenced. Pleadings and most of the witness statements appear to have been filed. The matter appears ripe for robust management with a short lead-in to trial. The amendments sought will trigger some additional delay to get to the endgame as amendments inevitably do. However, it is recognized that timelines can be vigorously managed by the Court to see to the due administration of justice.

23. While I am also mindful that the amendments are sought to be made at a time when no new information or development has occurred which has prompted the application and that they could and should ideally have been made much earlier, there is no real basis to deprive the defendant of defences which accrued to it.

24. In **Island Bell Limited v The Bahamas Telecommunications Company Limited** [2014] 2 BHS J No 25, the Court referred to **Fattal and others v**

Walbrook Trustees (Jersey) Ltd and others [2010] EWHC 2767, in which Lewison J cited **Worldwide Corporation Ltd v GPT Ltd** (Unreported 2 December 1998), a decision of Walker LJ. In discussing the court's discretion on an application to amend, Walker LJ opined:

"Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants. The only answer which can be given...is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.

"We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants, require him to be able to pursue it."

25. In the circumstances of this case, and considering the current pre-trial stage of the proceedings, and the arguable nature of the grounds raised in the proposed amendment, the Court is satisfied that leave to re-amend the Amended Defence in the form produced in the draft exhibited to the Affidavit of Nevado Fraser ought to be granted. In the interest of ensuring that all relevant matters constituting the real dispute between the parties are pleaded and determined, the amendment sought shall be allowed, but with compensation to the plaintiff in costs.

Application to Strike Out the Writ

26. The defendant seeks to invoke Order 18 rule 19(1) of the RSC and/or the inherent jurisdiction of the Court to strike out the plaintiff's Amended Writ. In its Summons the defendant cited the grounds under Section 210 of the Defence Act as the basis for the application.

27. The plaintiff complained that the Summons lacked the specificity required by the RSC in setting out grounds for the strike out. There is some merit to that argument. The defendant sought at the hearing to strike the action out on the additional ground of the plaintiff's lack of capacity as a mere "Intended

Administratrix" to commence the claim under the Survival of Action Act, which was not set out in its Summons as a ground for striking out the Amended Writ. However, the plaintiff's Counsel was not thoroughly taken by surprise by the grounds of the strike out because they were canvassed by the defendant's Counsel during a hearing on 5 September 2022 when it was foreshadowed that the application would be proceeded with to seek to amend the Defence and strike out the Amended Writ of Summons. Additionally, the Court gave directions for the service of arguments which were complied with by both parties and as such, the plaintiff had notice of the defendant's arguments for the amendment and strike out application. In fact, in argument against the strike out application, the plaintiff's Counsel addressed the issue of her capacity as Administratrix or otherwise to bring the claim pursuant to both the Fatal Accidents Act and the Survival of Action Act. Therefore, the Court does not consider the imperfection of the Summons for leave to amend and strike out as fatal to the defendant's applications.

28. Order 18 rule 19(1) provides:

"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."

29. As for the Court's inherent jurisdiction, in the rubric under Order 18 rule 19 at 18/19/26 of the Supreme Court Practice 1999 (page 353), the following is set forth –

"Inherent Jurisdiction – Apart from all rules and Orders...the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v Magrath (1889) 14 App Cas 665). In such cases, it will strike out part of an indorsement of a writ (Huntly v Gaskell (No 1) [1905] 2 Ch 656; or set aside service of it (Watkins v N A Land Co (1904) 20 TLR 534); or will stay, or dismiss before the hearing, actions which it holds to be frivolous or vexatious (Metropolitan Bank v Pooley (1885) 10 App Cas 210...".

The Immunity Argument

30. On the issue of striking out the Amended Writ by reason that the RBDF Members enjoy immunity, the plaintiff submitted that Section 210 is comprised of a general provision that no action shall be brought against members of the RBDF, followed by a proviso that the exemption would be applicable where the RBDF member acted bona fide in the execution of his duty. I accept the submission that the proviso limits the general enactment which precedes it. It follows that the immunity would not apply in circumstances where a member of the Defence Force acted in a manner which was not bona fide. The Court also accepts the plaintiff's submission that the onus of proof to show that it comes within the exception or proviso lies with the defendant. (See Francis Bennion, Statutory Interpretation, 3rd Ed. Part XXIII, 850-851).

31. The defendant argues that at this stage the Amended Writ ought to be struck out because the RBDF Members were acting in the course of their duty, and because this is not contested by the plaintiff on the current pleadings, the immunity applies and there can be no cause against the defendant. The Court is not prepared to strike the action out on the basis of a pleading that the RBDF Members were acting in the course of their duty. Given the words of the enactment from which they seek to derive the benefit of immunity, the defendant must prove that the RBDF Members have discharged their duty bona fide, which then activates the immunity.

32. The plaintiff argues that the averments in the Amended Writ of Summons suggests that the actions of the members of the Defence Force at the material time were not bona fide. The Court agrees with the submission of the plaintiff's Counsel as follows:

"It is for the defendant to prove, before the Court can decide whether the provisions of Section 210 of the Act apply...The Court can only determine whether a burden of proof has been met in a finite number of ways...[W]hether they [actions of the RBDF Members] are bona fide or not ...must be established...[and] can only be determined by the court on adjudication of the substantive matter. This requires consideration of the evidence, and circumstances of the incident."

33. In relation to the defendant's submission that the plaintiff has not contested that the RBDF Members were acting in the course of their duty, the Court is mindful

that the plaintiff would not have framed her existing pleadings with Section 210 in mind. In light of the thrust of the defendant's case now revealed by the draft amendment on the question of immunity, the plaintiff must have an opportunity to amend her pleadings to respond. The parties' opposing submissions have put into clearer relief that there may be 2 issues for determination on this point: (1) an issue over the interpretation of Section 210 of the Defence Act; and (2) whether in fact the RBDF Members performed their duties in such a manner as to become blanketed by the immunity.

34. In the circumstances, the Court is not inclined to strike out the Amended Writ on the basis, as argued by the defendant, that the RBDF Members were acting in the course of their duty and as such bona fides must be implied. The strike out application on that particular ground is therefore denied and the Court will wish to hear the evidence and argument in full on this aspect of the defendant's case.

35. Post amendment, once the pleadings are closed, the Court will provide, if required, further directions for the airing of any issue best-suited for a preliminary hearing in advance of the trial.

The Capacity Argument

36. The defendant's Counsel also submitted that the Amended Writ ought to be struck out by reason that the plaintiff lacked the capacity on 25 September 2017 (when she filed the original Writ) as an "Intended Administratrix" to commence the claim under the Survival of Action Act. In addition, it was argued that the plaintiff's subsequent amendment of the Writ on 2 November 2017 which reflected that she was then officially appointed and bringing the action as Administratrix could not cure the defective action initially brought without the relevant capacity.

37. Counsel relied on the well-rehearsed case of **Ingall v Moran** [1944] KB 160 in support of this submission. In that case the plaintiff filed a writ and sued the defendant in a representative capacity as administrator of his son's estate. However, he took out letters of administration months after he filed the writ. At first instance, the administrator was successful in obtaining an award of damages in relation to the death of his son by reason of the negligence of the defendant. The defendant appealed on the grounds that: (1) the action was not properly constituted because it was commenced when the administrator did not have the grant of letters of administration; and (2) even if the action became well constituted when the grant was issued, it was too late because it was not

commenced before the statutory limitation period had expired. The plaintiff argued that his title as administrator "related back" to the death of the intestate. After the court opined on the position of an executor who takes his authority from the will of the deceased, Luxmoore LJ stated:

"An administrator is, of course, in a different position, for his title to sue depends solely on the grant of administration. It is true that, when a grant of administration is made, the intestate's estate, including all choses in action, vests in the person to whom the grant is made, and the title thereto then relates back to the date of the intestate's death, but there is no doubt that both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ...I have no doubt the plaintiff's action was incompetent at the date when the writ was issued, and that the doctrine of the relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant has been obtained cannot be invoked so as to render an action competent which was incompetent when the writ was issued...It follows that no proper action was commenced before the statutory period of limitation expired. That period expired before any grant of administration was obtained, and the right of action was lost to the intestate's estate."

38. It is inescapable that **Ingall v Moran** applies to the circumstances of the first issuance of the Writ by the plaintiff on 25 September 2017 in that Mrs Turnquest's lack of capacity made the Writ defective for the purposes of an action under the Survival of Action Act. While under the Fatal Accidents Act a "Person Entitled" may issue a claim if no executor or administrator has done so within 6 months of the death of the deceased (see Section 4(2)(b) of that Act), no such capacity (that is prior to obtaining a relevant grant in the estate) exists for a person who wishes to bring a claim under the Survival of Action Act. However, after the plaintiff obtained the grant of Letters of Administration, she amended her capacity in the Writ (which she had not yet served) pursuant to Order 20 rule 1 of the RSC, and she reissued it as an Amended Writ on 2 November 2017 and served it for the first time on the defendant.

39. This amendment was not prohibited by Order 20 rule 1 which provides in part:

"1.(1) Subject to paragraph (3), the plaintiff may, without the leave of the Court, amend the writ once at any time before the pleadings in the action begun by the writ are deemed to be closed.
(2)...

(3) This rule shall not apply in relation to an amendment which consists of –
(a) the addition, omission or substitution of a party to the action or alteration of the capacity in which a party to the action sues or is sued...

unless the amendment is made before service of the writ on any party to the action." [Emphasis added].

40. As the amendment was made before service of the Amended Writ, the question then is whether the limitation period had run out to make the claim in her new capacity as Administratrix pursuant to the Survival of Action Act on 2 November 2017. The defendant contended that it did.

41. Sections 2(1) and subsections (3) and (5) of the Survival of Action Act provide:

"2. (1) Subject to the provision of this section, on the death of any person after the commencement of this Act all causes of action subsisting againt or vested in that person shall survive against, or, as the case may be, for the benefit of, that person's estate:

Provided that this subsection shall not apply to causes of action for defamation, seduction or breach of promise of marriage.

...

"(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either –

(a)...

(b) proceedings are taken in respect thereof not later than six months after the personal representative took out representation.

"(4)...

"(5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act, and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Act as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)." [Emphasis added].

42. Section 2(3) therefore sets the limitation period for bringing an action in tort against the estate of a deceased person as no later than 6 months from the date the personal representative of the estate of the deceased obtains the relevant

grant of representation. The section equally applies to an action in tort for the benefit of the estate of a deceased person by virtue of Section 2(5) where provisions which relate to causes of action against estates of deceased persons also apply to any cause not excepted from subsection (1).

43. In **Cash v Public Hospital Authority & Another** [2012] 2 BHS J No 92, a right of action in negligence became vested in the estate of Kethura Cash, deceased. The Court struck out the claim brought by the husband of the deceased because he did not have a grant of Letters of Administration when he commenced the claim against the defendant. Additionally, he did not reissue the claim before the statutory limitation period for bringing the claim had expired. The Court applied the limitation set out in Section 2(3)(b) of the Survival of Actions Act. This limitation period of no later than 6 months after the personal representative took out representation was therefore applied in an action in tort which survived for the benefit of the estate of the deceased.

44. The case is of further interest to this analysis because it appears that provided the limitation period has not elapsed, the defect in issuing an action without the relevant capacity may be rectified. His Lordship Justice Evans (as he then was) stated:

"15. I say the Survival of Action claim was misconceived not only because the facts pleaded did not substantiate such a claim but also due to the fact that at the time of the filing of the Writ the plaintiff had not been granted Letters of Administration of his wife's estate. To add to his difficulties after the grant was issued he failed to reissue the claim which could have rectified the earlier mistake. At this stage any new action is clearly barred by section 2(3)(b) of the Survival of Action Act." [Emphasis added].

45. The procedure identified by the Court in **Cash** to rectify the difficulty Mr Cash experienced appears to be the very thing the plaintiff (Dale Turnquest) did. She reissued the Writ as her Amended Writ and did so within the time limit set by Section 2(3)(b), which only started to run when the grant was obtained and not from the date of the deceased's death or any other date. As to the start of the calculation of the limitation period, in the case of **Smith Estate v United Cruise Ltd** [2003] BHS J No 68, relied upon by the defendant, the Court accepted that the limitation period did not start to run under the Survival of Action Act until the foreign grant of Letters of Administration had been resealed in the Registry of the Supreme Court of The Bahamas.

46. The grant of Letters of Administration was obtained by Mrs Turnquest on 23 October 2017, a date between 25 September 2017 when she issued the Writ and 2 November 2017 when she issued the Amended Writ. As such, 6 months did not elapse from the date she received the grant as Administratrix to the date upon which she reissued the Writ as her Amended Writ. It is therefore arguable she rectified the initial defect in her action at a point in time when the limitation period for bringing an action pursuant to the Survival of Action Act had not yet expired.

47. Viewed in this way, it cannot be said of the plaintiff's claim that it is incurably bad, or discloses no reasonable ground for bringing a claim or is an abuse of the process of the court.

48. In light of these considerations, while the Court is prepared to grant the defendant leave to amend the pleading to reflect averments on the argument as to the lack of capacity of the plaintiff when she filed her Writ, the Court is not inclined to strike out the action brought pursuant to the Survival of Action Act or any other part of the action brought by the plaintiff. There ought to be a consideration of the evidence and full argument on both sides - activities best reserved for the trial of this matter.

49. In the circumstances, I make the following orders:

(1) The defendant shall have leave to amend its Amended Defence with costs of the application and arising from the amendment to be paid to the plaintiff by the defendant.

(2) The application to strike out the matter under Order 18 rule 19(1) and under the inherent jurisdiction of the Court is dismissed with costs to the plaintiff to be taxed if not agreed.

Dated this 22nd day of September 2022

Simone I Fitzcharles

Acting Justice